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CHAPTER I

PROVINCE OF JURISPRUDENCE

(I) JURISPRUDENCE : A SOCIAL SCIENCE

Meaning of Social Science :—The Greek Philosopher, Aristotle (384–323 B. C.) remarked long ago that man is a “Social animal”. Human beings are gregarious and so associate with their fellows in manifold forms of activity. The mutual relations that grow up between them are the very bonds of society. From various points of view these social relations can be made the subject-matter of a systematized study. The knowledge derived from each point of view, when properly co-ordinated, forms a distinct science. The sciences which treat of man as a social and spiritual being and study his activities and operations as such may be designated as social sciences.

Distinguished from Natural Sciences :—Social sciences are to be distinguished from natural sciences. Man being a product of nature may be studied as such. The scientific knowledge of man as a mere physical being, without regard to his specific nature as a moral and social being, is the subject-matter of the natural science of human biology or physiology. The physical scientist is concerned, however, not so much with man as with natural phenomena. He has to explain the actual occurrences in nature and this he does by establishing that a certain event is the necessary consequence of another event. The physical scientist conceives phenomena of nature as united by an irrefragible law of causality. By means of the natural laws discovered by him a physical scientist is able to predicate what actually happens in a given conjunction of events.

Jurisprudence as a social science :—In the social sciences we are concerned with man as a moral or social being and have to arrange human acts according to the relation of means and purposes. The social scientist has to investigate what means should be adopted to answer certain social purposes and prescribe suitable rules of human conduct. Rules of human conduct enforced by political authority are laws. Jurisprudence as a social science addresses itself to those

who study law as a system of knowledge. It treats of the activity of men in society from the point of view of its legal significance.

(2) RELATION OF JURISPRUDENCE TO OTHER SOCIAL SCIENCES

Sociology :—The most general of the social sciences is sociology. It deals with the general principles underlying man's thought and action at all stages of social development and in every relation of life. That branch of this science which treats of primitive man and his social institutions is designated *Anthropology*. Juristic science or Jurisprudence is chiefly, though not exclusively, concerned with man in a well-ordered social organization, in an advanced stage of civilization. Anthropological research, however, has shed much light on many juridical questions and has enabled us to penetrate to the origin of many legal institutions.

Ethics and Theology :—*Ethics* is another social science. It expounds the principles and moral considerations which affect man's conduct and which constitute his criterion of right and wrong. Closely allied to Ethics is *Theology* in which the principles inculcated are presented as immutable and eternal principles endowed with divine sanction and as matters of unquestioning belief and implicit obedience. Juridical science too is concerned with human conduct, but its principles are changeable, being man-made, and have no claim to divine sanction, differing, however, from ethical precepts in that their enforcement may be compelled by human authority.

Psychology :—*Psychology* is yet another social science. It treats of man's mental states and processes, his emotions, thoughts and sensations. Jurisprudence is concerned with man's external conduct and not with his thoughts and mental processes, but important branches of it, such as *Penology*, have benefited much from the knowledge made available by psychological research.

Economics :—Social relations may be studied from the point of view of man's activity in satisfying his wants, in producing and distributing wealth. This is the subject-matter of the science of *Economics*. The intimate relation between Economics and Jurisprudence was first noticed by Karl Marx (1818–1883) and the interpretation of jural relations in the light of economic factors is receiving the serious attention of jurists.

Politics and legislation :—Societies have developed complex organizations for their government. We may study the principles on which societies are governed and by which the relations between men and their governmental organization should be regulated. The result of this study is the science of *Politics*. In a politically organized society there exist regulations, which may be called Laws, authoritatively laying down what men may or may not do. The study of the fundamental principles underlying these laws is the science of *Jurisprudence*. The closely allied science of *Legislation* deals with the principles by which the improvement of law may be effected.

(3) EVOLUTION OF JURISPRUDENCE

Philosophy as a universal science :—The elaborate division of intellectual labour suggested by the existence of numerous social sciences was not recognized by the ancients. In the early stages of human knowledge all the sciences were cultivated at the same time and by the same men. Aristotle, for instance, took all knowledge for his province and his studies embraced Metaphysics, Physics, Ethics, and poetics—all regarded as forming one universal science of Philosophy.

Why Greeks failed to produce a system of Jurisprudence :—Legal science seems to have been particularly ignored in antiquity. Some jurists are of the opinion that Jurisprudence was the first of the social sciences to take birth¹. The fact, however, remains that one of the most gifted of the peoples of the ancient world, the Greeks, have left us no systematic science of legal relations. The failure of the Greek jural system to attain to any marked degree of scientific elaboration is attributed by Sir Henry Maine to the mobile spirit of the Greek people. "The Greek intellect", observes Maine, "With all its mobility and elasticity, was quite unable to confine itself within the strait waistcoat of a legal formula; and, if we may judge them by the popular courts of Athens, of whose working we possess accurate knowledge, the Greek tribunals exhibited the strongest tendency to confound law and fact. The remains of the Orators and the forensic commonplaces preserved by Aristotle in his Treatise on Rhetoric, show that questions of pure law were constantly argued on every consideration which could possibly influence the mind of the

(1) See *Modern Legal philosophy series vol. 9, P. 289.*

Judges. No durable system of jurisprudence could be produced in this way " 1.

Roman contribution to Jurisprudence :—The Romans were the first to study legal philosophy ■ ■ ■ distinct branch of learning and to reduce legal phenomena to order and coherence. Indeed, the science of jurisprudence owes its name to their language. It is derived from the Latin words—*Jus* or *Juris* meaning law and *Prudentia* meaning knowledge.

The Romans succeeded in evolving a juristic science remarkable for its wealth of principles, which has been preserved to us in all its integrity in Emperor Justinian's *Corpus Juris Civilis* ². The light of this science failed Europe in the darkness that engulfed her when the Roman institutions were destroyed by the barbarian invaders.

St. Thomas Aquinas :—Juridical science emerges into view again in the thirteenth century as ■ branch of theology. It takes for its province the eternal and immutable law dictated by Nature or Divine Reason and since this alone is regarded as true law, legal science is confounded with and submerged in theology. Its attitude is accurately reflected by St. Thomas Aquinas (1228—1274) who, writing in the thirteenth century, said in the *Summa Theologica* : " Every law framed by man bears the character of a law exactly to that extent to which it is derived from the Law of Nature. But if on any point it is in conflict with the Law of Nature, it at once ceases to be law ; it is a mere perversion of a Law.

In the thirteenth century the newly found Roman law was being academically taught by the Glossators who had made it their vocation in life to explain the Roman law scientifically. Philosophic theology provided the authoritative basis for the reception of the old Roman Law.

Theology Differentiated from Legal Science :—The non-differentiation of theology from legal science was productive of great mischief in the political sphere. It was supposed that the religious beliefs of men could be regulated by law. Religious persecution was the inevitable result of such ■ policy. Luther raised his voice in loud

(1) *Maine : Ancient Law : P. 75.*

(2) *Corpus juris Civilis* = *Body of Civil Law*. [This work was prepared between 529–534.]

and emphatic protest against this unjustified invasion of law into the province of theology and ethics when he said : "Where the temporal powers presume to lay down the law for the soul, they usurp the rule of God and only succeed in seducing the soul and corrupting it. "

The emancipation of Juristic science from theology was begun in the sixteenth century. That was the period of the Reformation. The reformers had to struggle against the united power of the Pope and the Emperor. Their success marked a significant advance for the social sciences. As against the Emperor who embodied the supreme political authority, the point was gained that it was not within his province, that is, within the province of law, to meddle with the religious beliefs of the people. As against the Pope, the success of the reformers meant the repudiation of the extravagant claims of the Church to control the affairs of men. The way was thus paved for the secular state or political authority which would confine itself to secular laws.

Grotius and Hobbes :—The celebrated Hollander, Hugo Grotius (1583—1645) gave currency to the theory that while politically organised societies or states were bound to conform in their intercourse with other states to a higher international law or law of nature, in their internal affairs they could exercise sovereign or unfettered authority of law-making. The English philosopher, Hobbes (1588—1679) supported the claim of the state to unquestioning obedience, viewing its commands as laws possessing inherent binding efficacy.

Blackstone :—The view that laws of the State are not valid if contrary to the law of God persisted, however, for we find Blackstone (1723—1780), the first Vinerian Professor of Law at the University of Oxford, saying in his *Commentaries* : "The law of nature being coeval with mankind, and dictated by God himself is, of course, superior in obligation to any other. It is binding over all the globe in all countries, and at all times ; no human laws are of any validity if contrary to this ; and such of them as are valid derive all their authority, mediately or immediately from this original. "

Bentham :—The critical talents of Bentham (1748-1832) were called forth to confute the fallacious views of Blackstone and he

(1). *Blackstone : Commentaries on the Laws of England : Bk 1, p. 41.*

emphasized the point that law is binding on man so far as temporal sanctions could make it effective, even though it might be in contradiction to the law of God. Since Bentham's time this point has not been seriously contested and Juridical science may be deemed to have been finally freed from the shackles of theology.

In the process of emancipation from theology, Jurisprudence became united with Politics, International Law and Legislation. While Hobbes treated juridical problems with political bias and Grotius considered them as part of the comprehensive system of international law, Bentham regarded legislation as included within the province of Jurisprudence and called it 'censorial' jurisprudence.

Austin:—In the nineteenth century Jurisprudence grew apart from politics and International Law and was distinguished from the science of legislation. John Austin (1790-1859), who lectured on Jurisprudence from 1828 to 1832 in the University of London, pronounced the doctrine that legal science need not carry the authority of law to any higher ground than the will of the sovereign or supreme law-making power in the state, and that it is concerned only with the law that *is* and not with law as it *ought to be* which may be left to the theorist of legislation.

Jurisprudence after becoming an independent social science developed a number of distinct methods and gave rise to corresponding schools of thought. We shall now define Jurisprudence and then proceed to examine the several schools of thought which have developed out of this science.

(4) DEFINITION OF JURISPRUDENCE

Ulpian's Definition:—Etymologically, as we have already seen, Jurisprudence means 'Knowledge of Law'. The celebrated Roman Jurist, Ulpian (180-228) defined Jurisprudence as "The observation of things human and divine, the knowledge of the just and the unjust." This definition is too broad and might well apply to religion, ethics or philosophy. It is a good working definition of the Hindu conception of Dharma. Dharma is that from which arises ultimate welfare. Dharma concerns itself with the whole field of human conduct and prescribes what one may or may not do for attaining material prosperity and spiritual salvation. The field of Jurisprudence, however, is much narrower than that of Dharma.

Gray's definition :—Gray defines Jurisprudence as "the science of law; the statement and systematic arrangement of the rules followed by the courts and the principles involved in those rules".¹ This definition restricts the province of Jurisprudence to what Hindu Jurists describe as 'Vyavahara'.

The province of Vyavahara as defined by the sage Yagnavalkya may be stated thus : "If one aggrieved by others in a way contrary to the smritis and the established usage, complains to the King, that subject is one of the titles of 'Vyavahara'.

A judicial proceeding or legal controversy arises when a breach of duty occurs and a complaint is made to the king as the administrator of justice. The rules of *Vyavahara* are those by which proceedings or controversies are to be determined. The appropriate subject of Jurisprudence is the study of the principles underlying the rules applied in the judicial determination of legal controversies.

Salmond's definition :—Salmond defines Jurisprudence as the "Science of the first principles of the civil law."² Jurisprudence thus deals with a particular species of law, viz., civil law or law of the State. This kind of law consists of rules applied by courts in the administration of justice. It has characteristic features that distinguish it from law of every other kind. Of laws which govern the conduct of man in society we have three kinds : the laws of the theologian, the moralist and the jurist. It is with the jurist's law only that Jurisprudence is concerned. The laws of the theologian or religious laws derive their authority from a divine or superhuman source. They are intended to regulate human conduct as well as beliefs and are enforced by spiritual rewards or penalties in the other world, that is, by ultra-mundane sanctions. The laws of the moralist are man-made. They exist in societies the most primitive as well as the most civilized and are enforced by no determinate authority save public opinion which visits the contravention of those rules with ridicule, social ostracism and the like uncertain penalties. The laws of the jurist are easily distinguishable from those of the theologian and the moralist. They regulate external human conduct only and not the inner beliefs, therein differing from the laws of the theologian. In their mature condition they exist in politically organized society, that

(1) *Gray : The nature and the sources of law*

(2) *Salmond : Jurisprudence (10th Ed.), 2.*

is, a society which has an organized system of Government for its members who occupy a defined territory and over whom it can exercise an unlimited amount of control. They are enforced by courts or judicial tribunals of the society which apply a variety of sanctions ranging from capital punishment to a fine. The certainty of the sanctions and the existence of a determinate authority for enforcement distinguish the jurist's law from that of the moralist. It is the jurist's law or, as Salmond calls it, civil law, that is the fit subject of jurisprudence.

Austin's Definition:—Austin refers to Jurisprudence as the “philosophy of positive law”. By positive Law or *Jus positivum* he means the law laid down by a political superior for controlling the conduct of those subject to his authority. “Positive Law” as used by Austin is thus identical with “Civil Law”. The term “Philosophy” used by Austin in describing Jurisprudence is somewhat misleading.. Philosophy deals with the most general theories about things, human and divine, while Jurisprudence restricts itself to the general theory of man-made law.

Holland's Definition :—Sir Thomas Erskine Holland has defined Jurisprudence as the *Formal Science of positive Law*.¹ A formal science, as distinguished from a material science, is one which deals not with concrete details but with the fundamental principles underlying them. Jurisprudence in this view should concern itself with the general portion of legal doctrine. It should deal with the general conceptions and pervading principles that constitute the basis of any mature system of law. In every system of law there are certain fundamental conceptions and broad principles which serve as the basis for the concrete details of the law. Notions of property, contract, possession, etc., are basic to any well developed legal system. Jurisprudence separates these ideas and frames out a scheme of their purposes, methods and principles without going into the specific rules relating to them in any particular legal system. As Holland says: “Jurisprudence deals with the *human relations* which are governed by rules of law rather than with the material *rules* themselves.” Specific rules are the appropriate subject-matter of legal exposition or compilation rather than of juristic science. Since Jurisprudence deals only in a “formal or abstract way with those relations of mankind which are generally

(1) Holland: *Jurisprudence*, P. 13.

recognized as having legal consequences", Dr. Holland calls it a formal science.

Certain Criticisms Considered :—Prof. Gray in *'The Nature and the Sources of the Law'* and Dr. Edward Jenks in *'The New Jurisprudence'* have objected to the description of jurisprudence as a formal science. Prof. Gray remarks : "The relation of jurisprudence to law depends not upon *what* law is treated, but *how* law is treated. A treatise on Jurisprudence may go into the minutest particulars or be confined to the most general doctrines and in either case deserves its name ; what is essential to it is that it should be an orderly, scientific treatise in which the subjects are duly classified and subordinated " ¹. In this view a scientific treatise on any department of the law may be described as 'Jurisprudence'. Such usage is by no means uncommon, but if we understand by jurisprudence 'the science of law in general,' we must admit it to be a misapplication of this ponderous quadrisyllable. Prof. Gray's criticism cannot, therefore, be accepted as sound.

Dr. Jenks has remarked : "Can jurisprudence be truly said to be a purely formal science ? Not, it is submitted, unless the word 'formal' be used in a strained and artificial sense. It is true that a jurist can only recognize a law by its form ; for it is form which, as has been said, 'causes the manifold matter of the phenomena to be perceived'. But the jurist, having got the form as it were, on the operating table, has to dissect it and ascertain its meaning.....To say that Jurisprudence is concerned only with forms, is to degrade it from the rank of a science to that of a craft " ².

Dr. Jenks seems to confuse a formal science with a 'formalistic' manner of dealing with the science. If the jurist attaches undue importance to mere forms, takes positive law as the highest law and fails to penetrate to the social forces which mould the law, his treatment of his subject would be formalistic and unworthy of a great social science. Jurisprudence as a science, however, is concerned only with the form which conditions social life, with the human relations that have grown up in society and to which society attaches legal significance. In this sense jurisprudence is necessarily a formal science.

(1) Gray : *Nature and Sources of the law* : P. 147.

(2) Jenks : *The New Jurisprudence*. P. 140.

Jurisprudence defined :—We can see no valid objection to Dr. Holland's definition of Jurisprudence as the *formal science of Positive Law*. Being the systematized and properly co-ordinated knowledge of a subject of intellectual inquiry, Jurisprudence is a science. The subject of its inquiry is the mutual relations of men living together in organized society. The term 'Positive Law' confines the inquiry to those social relations which are regulated by the rules imposed by the state and enforced by its courts. Finally, the term 'formal' indicates, that the science deals only with the purposes, methods and ideas at the basis of the legal system as distinct from a 'material science' which would deal with the concrete details of the law.

(5) GENERAL AND PARTICULAR JURISPRUDENCE.

Austin's distinction :—Austin makes a distinction between 'general' and 'particular' Jurisprudence. According to him the former is "the science concerned with the exposition of the principles, notions and distinctions which are common to the systems of law, understanding by systems of law, the ampler and maturer systems which, by reason of their amplitude and maturity, are pre-eminently pregnant with instruction". 'Particular jurisprudence' is the science of any one of such systems of law.

View of the German Historical School :—The German historical school repudiated 'general' jurisprudence as such for it regarded law as the product of the genius of particular peoples. Puchta says, "Jurisprudence deals with Right ■ the system of a particular people as such ; and it only goes beyond the limits of this people in so far as its system of Right has likewise passed beyond them. It thus becomes Roman Jurisprudence or German Jurisprudence or English Jurisprudence and so on"¹. With its insistence on law as the product of the national spirit, the historical school naturally regarded jurisprudence as signifying 'Particular' jurisprudence only. There is, however, now in evidence ■ change in its attitude and ■ frank recognition of the human and universal character of law which attains concrete historical manifestation in the various national systems of law.

Salmond's Criticism of Austin's distinction :—Sir John Salmond has repudiated the notion of 'General' jurisprudence *as conceived by*

(1) Puchta : *Outlines of the Science of Jurisprudence*.

(Trans. Hastie): P 130.

Austin. According to him, a principle to become a topic of jurisprudence need not be, to use Austin's words, "common to the systems of law." Universal reception is not the *sine qua non* for a principle to qualify itself for treatment by the science of law. Salmond points out that even if the doctrine of judicial precedent or case law system prevails only in England, the rule of *Stare decisis* would be a fit subject for Jurisprudence. He concludes that "*Jurisprudentia genaralis* or general jurisprudence is not the study of legal systems in general but the study of the general or fundamental elements of a particular legal system"¹. Prof. Allen regards this statement as meaning that in Salmond's opinion 'Particular Jurisprudence' is the only kind of Jurisprudence properly so-called. No doubt, the sentence of Salmond above quoted seems to warrant this view, but what Salmond really requidiates is only the notion of 'general' jurisprudence, such as that of Austin, which carries the misleading suggestion that principles germane to general jurisprudence are such only because they are common to the mature legal systems. That there can be a theoretical jurisprudence embodying the principles that are basic to any legal systems is plainly affirmed by Salmond.

Holland's criticism and Conclusion :—The fallacy underlying Austin's distinction between 'general' and 'particular' jurisprudence is pointed out by Dr. Holland with his usual acuteness. He shows that in Austin's 'particular' jurisprudence it is only the material of the science, and not the science itself, which is "particular". It is possible to construct a science of law from the examination of one system only e.g., English Law. A science is made up of general propositions and sound generalizations are science whether they are drawn from a few phenomena or a great many. Of course, the larger the number of phenomena that are brought under observation, the greater is the probability that the conculusions drawn are sound and reliable. Dr. Holland, therefore, rejects the distinction made by Austin and holds that jurisprudence should be used without any qualifying epithet and that it represents the science of the basic principles of the law. It is hardly necessary to point out that it conduces to certainty in legal nomenclature to use 'jurisprudence' *simpliciter* to signify the science of law.

(1) *Salmond: Jurisprudence* : p. 4.

CHAPTER II

SCHOOLS OF JURISPRUDENCE

Threefold Classification:—As observed by Salmond, "Jurisprudence, in its specific sense as the theory or philosophy of law, is divisible into three branches." This division of the schools of Jurisprudence is based upon the fact that certain basic assumptions about law characterize the Jurists of each school and distinguish them from those of other schools of juristic thought. A comprehensive basis of classification is provided by the attitude of the jurists towards certain basic relations of law, eg., its relation to the state, its relation to the society and its relation to certain ideals such as justice, freedom of will or the pursuit of happiness. On this basis Jurisprudence is divisible into three major schools.

(1) ANALYTICAL SCHOOL.

Imperative, positive, teleological, English or Austinian school:—The jurists of the Analytical School consider that the most important aspect of law is its relation to the state. Law is treated as an imperative or command emanating from the state. For this reason this school is known as the Imperative School. The exponents of this school are concerned neither with the past nor with the future of law but with law as it exists, i.e., with law "as is" (*Positus*). For this reason this school is termed the positive school. This school is dominant in England and so is popularly called the English school. Its founder is John Austin who was the first occupant of the chair of Jurisprudence in the University of London. Hence it is also known as the Austinian school. ~~It is then called the school~~

The positive school takes for granted the developed legal system and proceeds logically to analyse its basic concepts and classify them so as to bring out their relation to one another. This concentration on the systematic analysis of legal concepts has given this school the name of analytical jurisprudence.

(2) HISTORICAL SCHOOL.

Contrasted with analytical school:—The historical school attaches importance not to the relation of law to the state but to the societal

institutions in which law exhibits itself. Customs and habit patterns of social groups loom large in the eyes of the historical jurist. While the analytical school confines itself to mature legal systems, the historical school concentrates its attention on the primitive legal institutions of society. To the analytical jurist the typical law is an arbitrary state command, but to the historical jurist the typical law is a customary rule spontaneously evolved by historical necessity and popular practice. With reference to their attitudes to basic legal conceptions the differences between the analytical and the historical schools may be exhibited as follows :

ANALYTICAL SCHOOL

1. Law is a product of the state.
2. If there is no sovereign, there can be no law.
3. The hall-mark of law is enforcement by the sovereign.
4. The typical law is statute.
5. Custom is not law until its validity has been established by a judicial decision or by an Act of the legislature. It is only a persuasive, i. e. historical source of law (Austin), or a legal material source of law (Salmond and Holland)

HISTORICAL SCHOOL

1. Law is found and not made. Law is self-existent.
2. Law is antecedent to the state and exists even before a state organization comes into being. UBI SOCIETAS, IBI LEX.
3. Law is independent of political authority and enforcement. It is enforced by the sovereign because it is already law; it does not become law because of enforcement by the sovereign.
4. The typical law is custom.
5. Custom is the formal source of law. It is transcendent law and other methods of legal evolution, e. g. precedent and legislation, derive their authority from custom. At any rate, custom derives its binding force from its own intrinsic vitality and not from judicial precedent or legislation purporting to follow or legalize it.

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| <p>6. Law rests upon the force of politically organized society.</p> <p>7. Law is the command of the sovereign</p> <p>8. In interpreting a statute judges should confine themselves to a purely syllogistic method.</p> | <p>6. Law rests on the social pressure behind the rules of conduct which it enjoins.</p> <p>7. Law is the rule whereby the invisible border line is fixed within which the being and activity of each individual obtains a secure and full space.</p> <p>8. In construing a statute judges should consider the history of the legislation in question.</p> |
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Comparative School :—The Comparative method aims at the collection, examination and collation of the notions, doctrines and institutions which are found in various legal systems worthy of comparative study. Its purpose is to distinguish what is local or accidental or transient in legal doctrine from what is general, essential and permanent.

The material at the disposal of Comparative jurist is not very extensive. A great many of the mature systems of law have been profoundly influenced by and are in fact based upon the Roman Law. The scope of the comparative method thus becomes very limited indeed. As Viscount Bryce observes : “ In practice the Comparative method becomes an examination of Roman conceptions with the help of light from England in those departments of English law which have been least influenced by Rome and of some glimmers from the East and from the laws of ancient European people”. Comparative jurisprudence is thus only a broadened form of the older Historical jurisprudence.

Historical Jurisprudence distinguished from legal history :—Legal history is not synonymous with historical jurisprudence. Legal history sets forth the historical process whereby a particular legal system has grown and come to be what it is. Historical Jurisprudence, on the other hand, is the history not of the legal system but of the first principles and basic concepts of the legal system. Historical jurisprudence thus traces how the concepts of property and of contract germinated and developed. The legal history, say of England, expounds how the law of property or of contracts was altered and developed from time to time. There can be no doubt that legal history is the store

house from which the historical jurist draws his conclusions. With the aid of legal history, the historical jurist can demonstrate how the fundamental notions lying at the basis of the legal system have evolved and trace scientifically the history of the first principles of law.

(3) PHILOSOPHICAL SCHOOL

§ **Ethical School, Metaphysical School or Law of Nature School :—**

*Attitude to law :—*The philosophical school concerns itself chiefly with the relation of law to certain ideals which law is meant to achieve. It investigates the purpose of law and the measure and manner in which that purpose is fulfilled. The philosophical jurist regards law neither as the arbitrary command of a ruler nor as the creation of historical necessity. To him law is the product of human reason and its purpose is to elevate and ennoble human personality.

§ **Relation between Ethics and Jurisprudence :—**The philosophical school regards the perfection of human personality as the ultimate objective of law. The science of Ethics, which deals with the principles and moral considerations affecting man's conduct and constituting his criterion of right and wrong, also sets for itself the goal of making man virtuous and so attain perfection. Since the ultimate objectives of jurisprudence and ethics are thus coincident philosophical jurists seek to differentiate between the subject-matter of the two sister sciences.

§ **Ethics does not rely upon compulsion :—**The German philosopher Immanuel Kant made a clear distinction between law and ethics. In "*Lectures on Ethics*" Kant observes : " Ethics concerns itself with the laws of free action in so far as we cannot be coerced to it, but the strict law concerns itself with free action in so far as we can be compelled to it ". Ethics is the science of virtue while law belongs to the science of right. Ethics aims at the elevation of man's inner life while law seeks the regulation of his external conduct. Organized society should not exercise compulsion to make man virtuous. Compulsion should be confined to the regulation of man's external conduct. "Woe to the political legislator", said Kant, " who aims in his constitution to realize ethical purposes by force, to produce virtuous intuition by legal compulsion. For in this way he will not only effect the very opposite result, but will undermine and endanger his political constitution as well.

§ “ **The Common ground of law and ethics** ” :—Salmond points out that “ **Philosophical jurisprudence is the common ground of moral and legal philosophy, of ethics and jurisprudence** ”. The justification for this statement would be found when we examine the conclusions of philosophical jurisprudence.

The philosophical school rivets its attention on the purpose of law and the justification for coercive regulation of human conduct by means of legal rules. Immanuel Kant has shown that the chief purpose of the law is the provision of a field of free activity for the individual without interference by his fellowmen. Law is the means by which the individual will is harmonized with the general will of the community. Law achieves this harmony by delimiting the sphere of permissible free activity of each individual. The individual will is moulded by ethics in the path of virtue so that it may freely acquiesce in and identify itself with the general will. Law sets to work in the opposite direction. It moulds the general will so that it may accommodate itself to the free play of individual will and so identify itself with the latter. There is thus a tendency for ethics and law to overlap and ultimately to coincide in the highest stages of their development.

The proximate object of jurisprudence is to secure liberty to the individual and its ultimate object is the same as that of ethics, namely the attainment of human perfection. Liberty, being the perfect relation between human beings, is an essential pre-requisite to the perfection of human personality. In realizing its proximate object, therefore, jurisprudence becomes a means towards the realization of its ultimate object which is the special object of Ethics also to achieve. Philosophical jurisprudence thus becomes the meeting-point and common ground of moral and legal philosophy—of ethics and jurisprudence.

(4) SOCIOLOGICAL SCHOOL.

Characteristics of the School :—A survey of the schools of Jurisprudence will not be complete without a reference to the Sociological school which has become prominent in recent years.

The sociological school, like the historical, attaches importance to the relations of law to societal institutions. The historical school, however, gives primacy to *Primitive* legal institutions while the sociological school concerns itself primarily with *contemporary* institutions of society.

The sociological jurists look upon law as a social phenomenon. Law is a social function, an expression of human society concerning the external relations of its individual members. The jurist should concentrate his attention not so much on individuals and their abstract rights as 'willing agents' as on the social purposes and interests served by law.

The sociological method necessarily undertakes the widest possible range of investigation of the facts and laws of social groups, ancient as well as modern, irrespective of the degree of civilization which they have reached, so as to secure a sounder scientific theory of juridical institutions than has yet been attained.

Dean Pound, The American Sociological jurist, draws attention to the following as the important characteristics of sociological jurists : "(1) They look more to the working of law than to its abstract content. (2) They regard law as a social institution which may be improved by intelligent human effort and hold it their duty to discover the best means of furthering and directing such effort. (3) They lay stress upon the social purposes which law subserves rather than upon sanction. (4) They urge that legal precepts are to be regarded more as guides to results which are socially just and less as inflexible moulds"². Such are the characteristic features of the Sociological School.

Functional School :—The fundamental tenet of the Sociological School is that we cannot understand what a thing is unless we study what it does. Law in action may be very different from law in books. The jurist should and is thus expected to study the actual functioning of legal institutions and endeavour to make legal rules really effective for the purpose for which they were designed. For this reason the sociological school is referred to by Paton in his work on 'Jurisprudence' as the Functional school.

(A) GERMAN SCHOOL OF "JURISPRUDENCE OF INTERESTS".

Jurisprudence of Interests :—A German school of jurists, known as the "Jurisprudence of Interests" has made a distinctive contribution to sociological jurisprudence. This school took up for development certain ideas about law which became current as a result of the work of the German sociological jurist, Rudolph Von Ihering. While writing the third volume of his great treatise, "*The spirit of the*

(2) 25 Harvard Law Review, p. 516.

Roman Law," Ihering discovered that ■ legal right was really ■ legally protected *interest* of the bearer of the right. From this Ihering concluded that there is a sociological purpose behind every rule of law. Law is not ■ spontaneous evolution, nor is it an arbitrary state product. It is not based upon reason but is the product of expediency, being fashioned to harmonize and reconcile conflicting interests in society.

Elaborating this idea Philipp Heck, the leader of the school of "Jurisprudence of interests" observes: "The fundamental truth from which we must proceed is that each command of the law determines a conflict of interests; it originates from a struggle between opposing interests, and represents as it were the resultant of these opposing forces."

The purpose of the social order is the protection of human interests. Since the interests of some men in society conflict with those of others and law cannot protect all of them, the function of law is to appraise such interests and select some for its protection.

Sociological Interpretation :—The school of Jurisprudence of interests aimed at finding a theory of judicial action which would obviate a technical construction of statute law. One of its chief contributions to Jurisprudence is the development of the sociological theory of judicial interpretation.

Jurists of the sociological school are inclined to give judges very wide latitude in the interpretation of enacted law. According to the jurists of this school, courts can properly refer to the history of social movements and enquire into the social needs, objects and purposes which were agitating the society at the time of the legislation and which the statute had in view. Kohler observes: "The opinion that the will of the law-maker is controlling in construing legislation is only an instance of the unhistorical treatment of the facts of the world's history and should disappear entirely from jurisprudence. Hence the principle: rules of law are not to be interpreted according to the thought and will of the law-maker, but they are to be interpreted sociologically, they are to be interpreted as products of the whole people, whose organ the law-maker has become".¹ Benjamin Cardozo has these pregnant observations on this subject: "Formerly men looked upon law as the conscious will

(1) Quoted by Dean Pound: *Modern Legal philosophy Series Vol. 9, at P. 225.*

of the legislator. Today they see in it a natural force.....It is no longer in texts or in systems derived from reason that we must look for the source of law; it is in social utility, in the necessity that certain consequences shall be attached to given hypotheses. The legislator had a fragmentary consciousness of this law; he translates it by the rules which he prescribes. When the question is one of fixing the meaning of those rules, where ought we to search? Manifestly at their source; that is to say, in the exigencies of social life. There resides the strongest probability of discovering the sense of the law. In the same way when the question is one of supplying the gaps in the law, it is not of logical deductions, it is rather of social needs, that we are to ask the solution.”¹

It should be noted that the method of sociological interpretation has not yet received judicial recognition. It has now the support of eminent jurisprudential writers and its importance is bound to increase with the deepening of the sociological tendency in the approach to juridical problems.

(B) REALIST SCHOOL OF AMERICA.

In America Sociological jurisprudence has developed an extreme wing under the name of the Realist school. The sociological method has brought legal science into intimate relation with the facts of social life and made jurists recognize law as a product of social forces. The realist movement applies the method with special reference to those aspects of the law which are connected with courts in the application of law. Law is regarded by these realists as emanating from judges. One of the greatest of American Judges, Oliver Wendell Holmes (1841-1936) is regarded as the spiritual father of this movement. In an address delivered at the Boston University Holmes made the following remark: “The prophecies of what the courts will do in fact and nothing more pretentious, are what I mean by the law.”² It has become a tenet of the realist school that a rule of law is a rule of conduct so established as to justify a prediction with reasonable certainty that it will be enforced by the courts if its authority is challenged. Owing to the importance which they attach to the judicial function in the creation of law, the realist school of jurists are led to investigate the precise nature of the judicial process and the various social factors at work in giving substance to a judicial decision.

(1) *Cardozo : Nature of the Judicial Process*, P. 121.

(2) *Holmes : Collected Papers*, P. 173.

CHAPTER III

EMINENT JURISTS AND THEIR METHODOLOGY

(1) English Jurists

(1) PHILOSOPHICAL SCHOOL

Francis Bacon (1561-1626) :—The first English jurist who introduced method into the study of law was Francis Bacon. The position of Jurisprudence prior to his time was summed up by him as follows : “ All those who have written of laws have written either as philosophers or as lawyers, and none as statesmen. As for the philosophers, they make imaginary laws for imaginary commonwealths : and their discourses are as the stars, which give little light because they are so high. For the lawyers, they write according to the states where they live, what is received law, and not what ought to be law.”¹

One of the tasks of Jurisprudence, according to Bacon, is to consider by what means laws might be made certain. Certainty is the prime necessity of law. Just as it is not possible for a soldier to prepare himself for battle if the trumpet gives an uncertain sound, it is not possible for the citizen to obey the law if it is uncertain or ambiguous. Bacon proposed the codification of law for removing its uncertainty.

Hobbes (1588-1679) :—Hobbes was the son of an English vicar. Graduating from Oxford in 1608 at the age of twenty, he became a tutor in the family of the Earl of Devonshire. This connection brought him into contact with Bacon, Ben Jonson and other English intellectuals.

The Civil War in England (1640-1660) profoundly affected the career of Hobbes. In 1640 he had to flee to France where he lived as a royalist emigre for eleven years. For two years he was tutor to the exiled Prince of Wales who was destined to take the Crown later as Charles II. Profoundly impressed by the sufferings of England during the civil war, Hobbes “ conceived the design of bringing all his powers of thought and expression to bear upon the production of an English book that should set forth his whole theory

(1) *Bacon : Works, 6th Vol. 389.*

of civil government in relation to the political crisis resulting from the war.”¹ Pursuant to this design in 1651 he published “The Leviathan”, a monumental work rightly regarded as an enduring masterpiece of political thought.

In the *Leviathan*, Hobbes launched upon an enquiry into the nature of the state by a study of the nature of man as a sentient being. According to him men originally lived in a state of nature. In the state of nature there was no common power whose behests were to be obeyed by the people. In that condition all men had a right to all things. This naturally caused discord for no one knew what things he could enjoy or what conduct he could observe without being molested by his fellow-men. The state of nature was thus a condition of war of every one against every one else. In order to escape the reign of violence which results from unrestrained liberty, the members of society enter into a social contract where each man contracts with every other man to divest himself of part of his liberty and set up a supreme power to conserve the liberty of all. Political society is an institution founded upon this social contract. The supreme power thus set up is the “great Leviathan or rather (to speak more reverently) the mortal God, to which we owe under the immortal God our peace and defence.”² It is designated the sovereign and all the other members of the political society called the state or “commonwealth” are its subjects. Hobbes’ contention was that the subjects were bound by the social contract and had no right to annul it or to oppose the sovereign authority set up by it. Hobbes was thus an apologist for the Stuart despotism.

At the core of Hobbes’ theory of sovereign power is the concept of law. Law, according to Hobbes, has its source in the sovereign power. “Law properly is the word of him that by right hath command over others.” Hobbes’ doctrine deriving the legal order from politically organized society and identifying a rule of law with the command of the sovereign authority has fertilized legal and political thought in different ways. It provided the underpinning for the theories of sovereignty and law embodied in the writings of the great Victorian Professor of Jurisprudence, John Austin. It likewise paved

(1) “Thomas Hobbes”, *Encyclopaedia Britannica*, (11th Ed.) Vol. XIII, P. 547.

(2) *Leviathan*, P. 89.

the way for Bentham and the movement for scientific legislation of which Bentham was the initiator and pioneer.

John Locke (1632-1704) :— Locke was born at Wrington, Somersetshire, in 1632. He took his Master's Degree from the Oxford University in 1658 and was for some time a tutor of philosophy at Oxford. In 1667 he became confidential secretary to Lord Ashley who in 1672 was made Earl of Shaftesbury and elevated to the post of Lord Chancellor by Charles II. When his patron, Shaftesbury, fell from power in 1681 and was tried for treason, Locke sought asylum in Holland. During the exile in Holland, Locke became acquainted with William, Prince of Orange, who was called by Parliament to the English throne after the Revolution of 1688. When William became king of England, Locke returned to his homeland and published in 1690 his celebrated work—*Two treatises of Government*. The avowed object of the work was “to establish the throne of our great Restorer, our preserver King William, and make good his title in the consent of the people.” The theories expounded by Locke in this work served as an antidote to the absolutist Hobbesian doctrines.

Locke also postulated a pre-political state of nature. In that condition men were in “a state of perfect freedom to order their actions, and dispose of their possessions and persons as they think fit, within the bounds of the Law of Nature, without asking leave or depending upon the will of any man.”¹ This condition was not an intolerable one of perpetual strife as imagined by Hobbes. Locke observes : “The state of nature has a law of Nature to govern it, which obliges every one, and reason, which is that law, teaches all mankind who will but consult it, that being all equal and independent, no one ought to harm another in his life, health, liberty or possessions”. The state of nature, though not utterly intolerable, had many inconveniences. The want of a known and impartial judge, and the lack of power to give due execution to decisions, impelled men to abandon the state of nature and enter into a political society. “There and there only,” observes Locke, “is political society where every one of the members hath quitted his natural power, resigned it up into the hands of the community in all cases that exclude him not from appealing for protection to the law established by it.” In the view of Locke “political power is a right of making laws, with penalties of death, and consequently all less penalties for the regulating and

(1) *Treatise*, P. 4.

preserving of property, and of employing the force of the community in the execution of such laws, and in the defence of the commonwealth from foreign injury, and all this only for the public good."

Any abuse of this political power might be met with resistance and people would have the right to save themselves and to constitute a new government. To Locke law is not an arbitrary state command for laws should be enacted solely for the good of society. "Law, in its true notion," observes Locke, "is not so much the limitation as the direction of a free and intelligent agent to his proper interest, and prescribes no farther than is for the general good of those under the law.....So that however it may be mistaken, the end of law is not to abolish or restrain, but to preserve and enlarge freedom."

Sir William Blackstone (1723-1780) :— Blackstone was the posthumous son of a silk merchant and was born on July 10, 1723. In 1741 he entered the Middle Temple and was called to the bar in 1746. He tried to popularize the Common Law by delivering a course of lectures on that subject in 1753. The Common Law had not till then been taught in any English University. Blackstone's lectures met with instantaneous success. In 1756 a gentleman by name Viner died leaving by his will a sum of £ 12, 000 to the University of Oxford on condition that the University would establish a professorship of the laws of England. Blackstone was appointed as the first Vinerian Professor at Oxford. The lectures delivered to his students were elaborated and given a permanent form in his *Commentaries on the Laws of England*. The book was written during the period from 1765 to 1769 and was published in four volumes. The work was a phenomenal success. In recognition of the success of the *Commentaries*, Blackstone was made Judge of the Court of Common Pleas in 1770. Blackstone died in 1780.

Blackstone defined law as "a rule of civil conduct, prescribed by the supreme power in a state, commanding what is right and prohibiting what is wrong". To Blackstone the law was a system of autonomous logic. He believed that from a few basic legal assumptions, all other principles could be derived by a process of logical deduction. The duty of the judge is to pursue the logical method and discover the rule of the immemorial common Law which would fit the facts of the case coming up for adjudication. Judges are thus only law-

finders and their function is to declare pre-existing law and not to create new law by means of their decisions.

Blackstone admirably succeeded in his primary purpose of lucidly expounding the existing law. Once the law was thus clearly delineated and exposed to the public gaze, an irresistible pressure for its reform was generated. The movement for legal reform was led by Bentham, one of the students of Blackstone, who had profound differences of opinion with his master and wrote a work entitled "A comment on the Commentaries."

(B) ANALYTICAL SCHOOL

Bentham (1748-1832) :—Bentham was born in London in 1748. He was a precocious child. At the age of three he began the study of Latin and at the age of four the study of the French language. He was graduated in 1763 from Oxford at the early age of fifteen. He was called to the Bar from Lincoln's Inn but he soon lost interest in the legal profession. He had however, a decided taste for jurisprudence and gave his attention to legal reform. His title to fame rests on his brilliant essay entitled *Fragments on Government* published anonymously in 1776 and the *Principles of Morals and Legislation* published in 1789. He died in 1832, leaving his body to science, with instructions that it be dissected in the presence of his friends. The skeleton of Bentham is still in the possession of the University College, London.

Bentham was the forerunner of the analytical method in England. He was decidedly averse to Natural Law and metaphysical-historical jurisprudence. He believed that law was made up of individual laws which are commands of the supreme power in a politically organized society. What distinguishes him from the genuine analytical jurist, however, is his faith in the existence of a higher principle by which legal rules may be tested. This superior principle he found in the principle of utility. In '*Introduction to the principles of Morals and Legislation*' Bentham explains this principle of utility as "that principle which approves of every action whatsoever according to the tendency which it appears to have to augment or diminish the happiness of the party whose interest is in question."¹ By his philosophy of individualist utilitarianism Bentham furnished us with ■ measuring

(1) Bentham : *Introduction to principles of morals and legislation* : P. 2.

rod by which laws may be tested. He was the great pioneer of the field of legislation and exercised a powerful influence on John Austin, the founder of the English or analytical school of jurisprudence.

Austin (1790-1859) :—Austin was born in 1790. At an early age he entered the army but resigned his commission in 1812 to take up the study of law. He was called to the bar in 1818. In 1819 he married Sarah Taylor, who belonged to a socially prominent family. The leading intellectuals of the day such as Bentham and James Mill used to be entertained by her at her home. In this way Austin came into touch with Bentham and his utilitarian doctrine. In 1826 the chair of Jurisprudence in the newly founded University College of London was offered to him. Before taking up that post, Austin devoted two years to the study of Jurisprudence in Germany where he came into contact with the great German Jurist Savigny. Austin commenced his lecturing work in the London University in 1828 but he resigned his professorship in 1832. His most important treatise, *The Province of Jurisprudence determined*, was published in 1832. Under the name of "*Lectures on Jurisprudence*" this work was posthumously republished by his widow along with certain supplementary papers.

Law for Austin consists of "commands set as general rules of conduct, by a sovereign to a member or members of the independent political society wherein the author of the law is supreme". It is clear that unlike the historical school, the analytical school regards law as an arbitrary creation. It sees the sanction or authority of law neither in its ethical basis nor in its historical background but in its enforcement by state authority. The typical law for it is a state command or statute.

Neo-Austinians :—The leading exponents of the Analytical School in England are Sir William Markby, Sheldon Amos, Sir Thomas Holland, and Sir John Salmond. Sir William Markby (1829-1914) was judge of the Calcutta High Court (1866-1878) and his '*Elements of Law*' was published in 1871. Amos (1835-1886) was a judge of the Court of Appeal in Egypt and published his '*Science of Law*' in 1874. Holland (1835-1926), Chichele Professor of International Law and Diplomacy, published his '*Elements of Jurisprudence*' in 1880. Sir John Salmond (1862-1924) was a judge of the Supreme Court of New Zealand and his great work '*Jurisprudence or Theory of Law*'

was published in 1902. The works of these authors are justly regarded as standard works on Analytical Jurisprudence.

Work of the Neo-Austinian School :—In the Neo-Austinian school there is discernible a tendency towards accommodation of its point of view to those of the other schools. The chief defect in the conclusions of the analytical school lay in ignoring the social aspects of law and its ethical basis and emphasizing the capacity for its coercive enforcement and its enunciation by sovereign political authority. While the Historical School regarded custom as the very type of law, the Austinians denied entirely the claim of customary law to be recognized as law *strictu-sensu*. International law, the existence and binding efficacy of which Grotius took great pains to establish, is relegated by the Austinians to the category of positive morality.

Prof. Robson in '*Civilization and the Growth of Law*' has deplored the fact that "English legal thought since Bentham has run in narrow grooves, remaining crabbed and 'practical' in the worst sense of the word, unimaginative and devoid of any philosophical, ethical or sociological background. It is scarcely too much to say that jurisprudence hardly exists in Great Britain. Philosophy and law are barely on speaking terms, while sociology and law are strangers who have never even met." ¹

The Neo-Austinian School in England has shown itself responsive to the criticisms of the other schools of juristic thought. Jethrow Brown has recast the Austinian definition of law as follows : "Law is an expression of the general will affirming an order which will be enforced by the organized might of the state and directed to the realization of some real or imaginary good." ² The admission that law is not a mere state command and that it proceeds from the 'general will' coupled with the recognition of the fact that law discharges a social function by the 'realization of some good' shows an unmistakable attempt to supply the missing ethical element in Austin's conception of law. Sir John Salmond recognizes customary law as a legal material source of law and so entitled to be regarded as law in the strict sense of the term. International law too in Salmond's opinion is not mere positive morality but a special kind of law known as Conventional Law.

(1) Robson : *Civilization and the Growth of Law*, P. 254.

(2) Jethrow Brown : *Austinian Theory of Law : Excursus*, P. 354.

(C) HISTORICAL SCHOOL.

Sir Henry Maine (1822-88) :—The honour of being the founder of the historic-comparative school of Jurisprudence in England belongs undoubtedly to Sir Henry Maine. This savant of legal science became Regius Professor of Civil Law in the University of Cambridge at the remarkably early age of twenty-five. He was Law Member in the Council of the Governor-General of India between 1861 and 1869 and had an opportunity of observing at first hand and studying Indian conditions. His knowledge of Indian legal institutions was a great asset to him as a student of comparative jurisprudence.

Maine occupied the chair of historical and comparative jurisprudence in Corpus Christian College, Oxford from 1869 to 1877. Thereafter he held the position of master of Trinity Hall, Cambridge. In 1884 he was appointed Whewell Professor of International Law at Cambridge. He held the position for a year and died later in 1888.

His Works :—The first published work of Maine is '*Ancient Law*' (1861) which is practically a manifesto of his life-work. In it he stated his broadest general doctrines. The more important of his later works—*Village Communities* (1871), *Early History of Institutions* (1875), *Dissertations on Early law and Custom* (1883)—follow out in greater detail and with more scientific elaboration the general principles formulated in '*Ancient Law*' at the outset of his scholastic career.

Leading ideas :—The leading ideas of Sir Henry Maine are divisible into three groups. The first relates to the origin, sources and development of law in general. Maine shows that at its origin law is entangled with religion and traces its development as follows : first personal commands and judicial decisions or *themistes* giving rise to patriarchal rules ; then customary law expounded by priestly aristocracies ; thirdly, the fixation of customs in codes in order that the law may be known to the people ; next, the gradual modification of this archaic written law by the help of fiction, equity and legislation ; later on, the rise of philosophic theories with the spread of international intercourse and ultimately the advent of scientific jurisprudence.

The second group of ideas familiarized by Maine is concerned with the origin and development of society. Maine subscribes to

the *Patriarchal Theory* of Society. The evidence furnished by ancient law leads him to the conclusion that the primal unit of society was the Family and not the Individual as in modern society. This family was organised on the patriarchal model presided over by the oldest living male ascendant. "The aggregation of Families forms the Gens or House. The aggregation of Houses makes the Tribe. The aggregation of Tribes constitutes the Commonwealth."¹

The third group of ideas developed by Maine is in connection with private law. Maine has given us illuminating studies of the evolution of the law of wills and succession, of the institutions of Private Property and Contract.

The most conspicuous feature of Maine's work is the breadth and brilliance of his generalizations made on the basis of a comparative estimate of legal institutions in various societies at different levels of historic development. His work abounds in such broad generalizations as that "the penal law of ancient communities is not the Law of Crimes but the law of Torts"; that "the positive duty resulting from one man's reliance on the word of another is among the slowest conquests of advancing civilization"; and that "the movement of progressive societies has hitherto been a movement from status to contract."

Not one of the theories associated with the name of Maine has passed without challenge. The researches of scholars of comparative jurisprudence have revealed that his doctrines require modification and qualification in various directions. None can impugn, however, the originality of his methodology. As Sir Frederic Pollock says in his *Introduction to Maine's Ancient Law*: "We may till the fields that the master left untouched, and one man will bring a better ox to yoke to the plough and another a worse; but it is the master's plough still."

(D) SOCIOLOGICAL SCHOOL

Herbert Spencer (1820-1903):—The most distinguished of English sociologists is Herbert Spencer. By calling to aid ethnographical and anthropological material he demonstrated that societies resemble individual organisms. "Originating in small beginnings, they develop complex structures the component parts of which become

(1) *Maine: Ancient Law* P. 106

more and more independent while the social organism itself becomes more and more independent of its constituent units ”.

In ‘ **Principles of Sociology** ’ Spencer traces his theory of the origin of law. He shows that law arises from four sources, namely, inherited usages with quasi-religious sanctions, injunctions of deceased leaders, the will of the predominant man and collective opinion of the community. Laws of supposedly divine origin are first differentiated from laws of recognised human origin. Human laws become further differentiated into those which are sanctioned by the ruler and those which are sanctioned by the aggregate of social interests and of these the latter, in the course of social evolution, tend more and more to absorb the former. Ultimately it would be recognized that ‘ law will have no other justification than that gained by it as a maintainer of the conditions to complete life in the associated state.’ ”¹

(2) Continental Jurists

(A) PHILOSOPHICAL SCHOOL

Grotius (1583-1645):—The great Dutch jurist, Hugo Grotius was born in the city of Delft in 1583. He was christened Huig Van Groot but has become famous under the Latin *nom de plume* (Hugo Grotius) adopted by him at the University of Leyden. Even as a child Grotius astounded every one by his precocious genius. He was composing Latin verses at the age of eight. At the age of sixteen he took the degree of Doctor of Laws and set up a successful practice at the Hague. At the age of twenty he was appointed advocate-general for the Provinces of Holland and Zeeland and at thirty he became the Chief Magistrate of Rotterdam.

Grotius seemed destined for a great career but a religious schism in Holland landed him in disaster. The Dutch Reformed Church had split into two sects, the Arminians (or Remonstrants) led by Arminius, a Professor of Theology in the University of Leyden, and the Calvinists (or Contra-Remonstrants), who acknowledged as their leader another Professor of Leyden by name Gomarus. Theologically, the controversy revolved around the doctrine of predestination. The disputants, however, had also political differences. The United Provinces of Holland were a loose aggregate of independent sovereignties which had delegated a very limited power to the States-General. The Calvinists championed greater amplitude of power for the

(1) *Spencer: Principles of Sociology*, 537.

Central government and on the political side followed Prince Maurice, the *Stadholder*. The Arminians, on the other hand, were supporters of the claim of the provinces and were under the leadership of Barneveldt, Chief representative of the province of Holland. Grotius was the right-hand man of Barneveldt. In the struggle that followed the Arminians were unsuccessful. In 1619 Barneveldt was condemned to death and Grotius was sentenced to perpetual imprisonment. Grotius was confined in a fortress at Louvestein. During his stay in prison Grotius wrote "*An introduction to the Jurisprudence of Holland*". After two years spent in reading and writing Grotius managed to escape from prison owing to the courage and ingenuity of his wife. Books for study were being brought to Grotius in prison periodically in a good sized trunk. Very ingeniously Grotius was substituted in the trunk for the books that were to be taken away and was carried to freedom. Grotius reached Paris in 1621 and led the life of an exile.

Grotius was appalled by the horrors of the Thirty years' war which was then raging in all its fury. In 1623 he began his *magnum opus*, which he called *De Jure Belli ac pacis* (The law of peace and war). The book rightly regarded as the first thorough and comprehensive book on International Law was published in 1625 and immediately brought its author international fame earning for him the title of father of International law.

In 1630 Grotius renounced his Dutch citizenship and went to Sweden. In 1635 the Queen of Sweden appointed him as Swedish ambassador in Paris. He held this post for ten years. In 1645 he relinquished that post and while on his way to Lubeck died at Rostock after a short illness on the 29th of August. He was buried in his own native land at Kirk which, by virtue of the entombment of the celebrated jurist, has become an international shrine.

Kant (1724-1804) :—Immanuel Kant was born in Koenigsburg. For more than 30 years he held the chair of logic and metaphysics at the University of Koenigsburg. He was a bachelor all through life and his habits were so precise that when he came from his study in the afternoon to take his usual walk, the neighbours used to set their watches at four o' clock.

The celebrated works of Kant are *The critique of Pure reason* (1781) and *The critique of practical reason* (1788). His philosophy

of Law is a short treatise embodying the maturity of his thought and represents the culmination of his labours in the realm of practical reason.

According to Kant it is possible to deduce ■ single universal practical principle of law from which all laws may be derived. The distinctive feature of man is his ability to *will*, i.e., his capacity to reach ■ free decision. The principle that determines the will is called by Kant 'an imperative'. Imperatives are of two kinds: the hypothetical imperative which presents the necessity of an act as a means towards a desired end, and the categorical imperative which presents an act as of itself objectively necessary without reference to any ulterior end. It is the categorical imperative that should govern the human will and it proceeds from the conception that a person should so act that his rule of conduct, not having any ulterior ends, permits him to desire that it may become a universal law. This universal law, as Kant points out in his '*Philosophy of Law*,' may be expressed thus : "Act externally in such a manner that the free exercise of thy will may be able to co-exist with the freedom of all others."¹ It follows from this that law is the "sum total of the conditions under which the personal wishes of man can be reconciled with the personal wishes of another man, in accordance with a general law of freedom." The justification of law and coercive regulation is the provision of a field of free activity for the individual without external interference. The basis of its authority is to be sought in the intrinsic force of the just rule as binding upon a moral entity.

Hegel : (1776-1831) :—Hegel was born at Stuttgart in 1776. He took the Doctorate in Philosophy in 1790 from the University of Tubingen. After being a private tutor and lecturer on Logic and Metaphysics for some years, in 1805 he became professor in the University of Jena. Napoleon's invasion of Germany culminating in the battle of Jena in 1806 disturbed his work and he left the University for some years. In 1818 he was called to the Chair of Philosophy in the University of Berlin. At Berlin Hegel attained national and international fame.

The outstanding works of Hegel are *Phenomenology of spirit* (1807), *Science of Logic* (1816), *The Philosophy of Right* (1821); and *The Philosophy of History* (Posthumously published in 1837).

(1) Kant : *philosophy of law* (Hastie's Trans.) P. 46.

The Kantian doctrine of freedom of will as being the end of law was elaborated by Hegel. According to this German philosopher the human spirit achieves cognition of its personality once it transcends the stage of mere physical sensation. Having awakened to the knowledge of itself as the free Ego, it proceeds to assert itself. It thus comes into conflict with other Egos. The purpose of the legal order is to produce a synthesis of the conflicting Egos in society by attuning the self-consciousness of each to that of the others and so merge the self-centred consciousness of each ego in the universal consciousness. This purpose is achieved by the recognition of the freedom of the ego, limited only by the like freedom of other egos. Legal right is the objective realization of such recognition by the universal will and aims at securing to each individual an external sphere of freedom, that is, of free activity as regards his person and property.

Hegel's great contribution to Philosophical Jurisprudence is the development of the idea of *Evolution*. In his view all the various manifestations of social life, including law are the product of an evolutionary, dynamic process. This process takes on a dialectical form, revealing itself in thesis, antithesis, and synthesis. The human spirit sets a thesis which becomes current as the leading idea of a particular historical epoch. In due course against this thesis an antithesis is set up and from the ensuing conflict a synthesis develops which, absorbing elements of both, reconciles them on a higher plane. This process repeats itself time and again in history.

In '*Philosophy of Right and law*' Hegel demonstrates that behind the colourful pageant of history is one prevailing idea, the idea of freedom. History is the march of the spirit of freedom. Legal history is the march of freedom in civil relations. Ecclesiastical bondage has given way to temporal freedom; tyrannical rule has given way to freedom of legal government and economic enslavement of the citizen has given way to economic freedom. Thus society may change and has always changed, but in the adaptation of the law to changing society the changes in law are governed by an ascertainable dialectic, the evolution of the grand idea of freedom. It is to this idea which is realizing itself in history that all law should conform. By conformance to this idea, the purpose of the legal order would be fulfilled, the purpose, that is to say, of raising humanity to perfection.

Kohler (1849-1919):—Kohler stood directly in the tradition and under the influence of the Hegelians. His definition of law as “the standard of conduct which in consequence of the inner impulse that urges men towards a reasonable form of life, emanates from the whole, and is forced upon the individual” stamps him as a Neo-Hegelian.

In ‘*Philosophy of Law*’ Kohler postulates the promotion and vitalizing of culture as the end to be achieved through the instrumentality of law. By culture he means the totality of humanity’s achievement. Kohler points out that the assumption of a Law of Nature, a permanent law suitable to all times, is fallacious since it involves the notion that the world has already attained the final aim of culture. In actual fact, civilization is changing and progressing and law has to adapt itself to the constantly advancing culture. Every culture should thus have its own postulates of law to be utilized by society according to requirements. While there is no doubt a universal idea of civilization, there is no eternal law or universal body of legal institutions, suitable for all civilizations. What is good for one stage of culture might be ruinous to another.

An eminent American jurist, Dean Pound, considers that Kohler’s “formulation of the jural postulates of the time and place is one of the most important achievements of recent legal science.”¹ The natural law of the Philosophical School loses its rigidity and becomes charged with a changing or growing content being conceived as something relative and not as something that shall stand for ever.

Rudolph Stammler (1856-1938);—Stammler was a professor of law at Halle, Berlin and other German Universities. He has achieved celebrity by his ideal of social justice, principles of just law and his conception of a “natural law with changing content”. Stammler is a neo-Kantian and his philosophical position is summed up in ‘*The Theory of Justice*.’ He frankly admits that “there is not a single rule of law the positive content of which can be fixed *a priori*.”² He emphasizes, however, the need for the development of a theory of just law in addition to the investigation of positive law. In his view the content of a given law can be tested with reference to the theory of ‘just law.’

(1) Pound: *Interpretations of Legal History*, p. 150.

(2) Stammler: *Theory of Justice*, p. 90.

A law, in the view of Stammler, is just if it conforms to the Social Ideal, that is, if it brings about ■ harmony between the purposes of the individual and those of society. The Social Ideal is "a community of men *willing freely*"¹ and represents the union of individual purposes. It requires, first, the maintenance of the proper interests of every associate and, second, the maintenance of social co-operation. The first requirement leads to two principles which Stammler expresses thus: "(1) The content of ■ volition must not be left to the arbitrary control of another. (2) A juristic claim must not subsist except on the condition that the one bound may still remain his own neighbour," that is, may be an end in himself. These formulae prevent a juristic precept from sacrificing an associate to the subjective purposes of another and being treated as a means to the accomplishment of the purposes of that other party. The second requirement, namely, that of social co-operation also leads to two principles: "(1) He who is juristically united with others cannot be arbitrarily excluded from the community. (2) A power of disposition juristically granted cannot be exclusive except in the sense that the one excluded may still remain his own neighbour." Stammler developed the application of these principles to the important spheres of juristic life under the section—"The Practice of Just Law."

Having presented his 'Social Ideal' Stammler admits, and this is important, that two legal systems, which have very different rules and principles of law, may both be in conformity with the Social Ideal. It is clear that his conception of the Social Ideal gives us once more Natural law with ■ changing content.

Del Vecchio :—Another representative of the nascent idealism in juristic science is Del Vecchio of Italy. In '*Formal Bases of Law*' Del Vecchio maintains that the human mind has the faculty of determining rules of justice independently of positive law and he points out that a contrary view would logically exclude the possibility of legal reform. He thus subscribes to the conception of Natural Law. He observes: "It would be improper to attribute to natural law ■ mode of phenomenal being or actual existence, for, though found in experience, it is essentially metempirical and deontological; and it would be equally illegitimate to

(1) Stammler : *Theory of Justice*, p. 153.

infer the non-existence of law as a right and an ideal because it does not exist and have its being as phenomenon"¹.

(B) HISTORICAL SCHOOL

Bodin: (1530-1596) Jean Bodin was born at Angers, France, in the year 1530. He was for some time lecturer on jurisprudence at the University of Toulouse. He practised as an advocate in Paris and was appointed King's attorney at Laon in 1576. In 1596 Bodin died of the plague.

The work on which Bodin's fame reposes was "*On the Commonwealth*" published in French in 1577. The work was published in Latin under the title of *De Republica* in 1586. In this treatise Bodin defined sovereignty or Majestas as "an absolute power, not subject to any law". Law was defined as "the command of the sovereign concerning all his subjects in general or concerning general things." Bodin is remembered chiefly as the father of the doctrine of sovereignty.

One of the favourite doctrines of Bodin was that the study of history is necessary to explain the origin and nature of law. He regarded the actual law of every people as an imperfect expression of the evolution of diverse legal systems it would be possible to discover true law. For this reason Bodin is sometimes called the father of comparative and historical jurisprudence.

Savigny: (1779-1861):—Savigny was born at Frankfort in 1779. He studied law in the University of Marburg. In 1803 he published his treatise on the *Right of possession* which established his reputation as a sound scholar of Roman law. In 1810 he was called to the chair of Roman law at the University of Berlin. In 1842 he accepted the post of High Chancellor of Prussia, the highest office in the Prussian judicial hierarchy. In 1848 he retired and devoted himself exclusively to the study of jurisprudence. He died in Berlin in 1861. The works of Savigny include: *Of the Vocation of our Age for Legislation and Jurisprudence* (1814), *History of Roman law in the Middle Ages* (1815-1831), *System of Contemporary Roman law* (1840-49) and *Contracts* (1853).

(1) *Del Vecchio: Formal Bases of Law*, p. 322.

Savigny is regarded as the founder of the Historical School on the Continent. He put forward the view that the law of a people like its language and manners forms and develops by itself. It evolves without the aid of enactments and prescriptions of political authority, much as the rules of the well-known games of a people are formed. These rules establish themselves gradually by the successive resolution of doubtful questions in particular cases. Law is formed by a similar process.

Savigny was himself trained under the powerful influence of the philosophical school. His own definition of law is remarkable for its resemblance to the Kantian definition. For him, as also to the ethical school of jurists, law is "the rule whereby the invisible border-line is fixed within which the being and activity of each individual obtains a secure and free space." His divergence from the philosophical school, however, is with reference to the true nature of law and the source from which it proceeds. While the philosophical school conceived of law as originating in man's reason and having its authority its ethical or moral basis, Savigny sees law as a spontaneous evolution of the national spirit, having its justification in the social pressure behind it or in historic necessity.

Savigny confuted for the first time in a scientific manner the hypothesis of natural law. He showed that law is not formed by Nature and is not discoverable by pure reason. Law is the product of the *Volkgeist*, the national spirit or genius of the people. The content of a legal system is thus determined not by reason at all, but by the qualities of the people by whom it is developed. Savigny was not oblivious to the fact that the development of law is largely carried on by professionally trained jurists, but this he explains by regarding legal experts as the representatives of the people. "The foundation of the law," says Savigny, "has its existence, its reality in the common consciousness of the people. We become acquainted with it as it manifests itself in external acts, as it appears in practice, manners and custom. Custom is the sign of positive law..... when in course of time law is developed in its details, it can no more be mastered by the people generally. A separate class of legal experts is formed, which itself an element of the people, represents the community in this domain of thought."

The view of the philosophical school that the principles of law can be found by the exercise of reason and may be stated with

certainty and definiteness led towards the close of the eighteenth century to the belief that a perfect code of laws could be constructed by jurists by ■ effort of reason unaided by historical legal materials. A German professor of Civil Law, Thibaut (1771-1840) put forward a proposal for the preparation of ■ code of laws for the Germans on the model of the Code Napoleon. This proposal was vigorously opposed by Savigny who published in 1814 his *Vom Beruf—The Vocation of Our Age for Legislation and Jurisprudence*, assailing the view that law could be made consciously by human reason embodied in legislation, and giving currency to the theory that law is the product of a people's genius unfolding itself in history and expressing itself in custom or popular practice. Savigny thus founded the Historical School which put an end to the dominance of the *Philosophical or Law of Nature School* in juridical science.

(C) ANALYTICAL SCHOOL

Dr. Hans Kelsen :—Kelsen was Professor of law at Viena and took a prominent part in drafting the Austrian Constitution of 1920. He is a supporter of the imperative conception of law. In his *Pure Theory of Law* Kelsen develops the thesis that law is not merely a rule of human conduct, but a norm which determines how such rules are made. The basic norm is one which enjoins obedience to the existing constitution. It is upon this that the validity of the Constitution is postulated. Once the basic norm is presupposed, every legal norm may be conceived of as deriving its legal force from the norm creating power prescribed by the Constitution. As Kelsen observes : "Legal norms have to be created through acts of will by those individuals who have been authorized to create norms by some higher power". This, it would be readily seen, is a modified statement of the imperative conception of law and method adopted is the analytical method.

(D) SOCIOLOGICAL SCHOOL

Montesquieu (1689-1755) :—The French philosopher Montesquieu is the forerunner of the sociological method in jurisprudence. He was the first to recognize and take account of the influence of social conditions on the legal process. In '*The spirit of Laws*' he declared that laws should be determined by ■ nation's characteristics so that "they should be in relation to the climate of each country, to the quality of each soil, to its situation and extent, to

the principal occupations of the natives, whether husbandman, huntsmen or shepherds; they should have relation to the degree of liberty which the constitution will bear, to the religion of the inhabitants, to their inclinations, riches, numbers, commerce, manners, and customs". This is a clear statement of the sociological conception of law.

August Comte (1798-1857):—The honour of being the founder of the science of Sociology belongs to another French Philosopher August Comte. The legitimate object of scientific study, according to Comte, is society itself and not any particular institution of government. He stressed the fact that men have ever been associated in groups and that it was in the social group and not in isolated individuals that the impulses originated which culminated in the establishment of law and government. He definitely rejected the view that society rests upon an individualistic basis and that the individual is the focal point of law. His philosophy is thus in sharp contrast to the mechanistic philosophy current before his time.

Karl Marx (1818-1883):—Karl Marx was a native of Rhineland and was educated at the University of Berlin. Communist philosophy stems from his writings. His economic theory of evolution, known also as dialectical materialism or economic determinism, has immortalized his name. According to Marx, the ruling ideas of every epoch are those of its ruling class. The ruling class is itself a product of the system of economic production. When economic production was based upon slavery, the slave-owners constituted the ruling class. Under feudalism, the landowners monopolized political power. Under capitalism which has superseded feudalism, the bourgeoisie, i. e. the middle class, the employers of labour, constitute the ruling class and they exploit the proletariat, i. e., the working class. The Communist Manifesto of 1848 declared: "Law, morality, religion are to the proletarian ■ many bourgeois prejudices, behind which lurk in ambush just as many bourgeois interests." According to Marx's evolutionary theory the next step in social progress would be the overthrow of the bourgeoisie by the proletariat. In terms of the Hegelian dialectic of history bourgeoisie dominance is the thesis, to which proletarian dictatorship would be the antithesis. The synthesis would be reached when ■ classless society is attained in which there is no exploitation of one class by another. In such ■ society there would be no need for law and the state would wither away.

Jhering (1818–1898) :—The German jurist, Rudolf Von Jhering, was born in 1818 at Aurich in East Friesland. He became a teacher of Roman law and published his *magnum opus* from 1852 to 1865 in four volumes under the title “*The spirit of the Roman law in the various stages of its development.*” This publication brought him recognition and was translated into the principal European languages. In 1867 Jhering became Professor in the University of Vienna. The distractions of that metropolis interfered with his academic work and so he left Vienna and joined the Gottingen University where he spent the last two decades of his life in pioneering a new school of jurisprudential thought.

Until Jhering's time law was regarded as a system of delimiting abstract rights. From juristic texts concepts were derived by a process of interpretation. By a process of logical deduction one legal principle was derived from another. This idea of analysis and combination of legal principles was dominant in Jurisprudence. It was against this conceptual jurisprudence that Jhering delivered his attacks. In *The Struggle for Law* published in 1872, Jhering developed the thesis that the origin of law is to be found in social struggles. “The birth of law”, he declared, “like that of men has been uniformly attended by the violent throes of childbirth. In *Law as a Means to an End*, the first volume of which appeared in 1877, Jhering showed that law is a system of reconciling conflicting interests. “Purpose,” he said, “is the creator of the entire law.” Referring to the Philosophical school, he observed : “You might as well hope to move a loaded wagon from its place by means of a lecture on the theory of motion as the human will by means of the categorical imperative..... The real force which moves the human will is interest.” The doctrine of the historical school that law evolves spontaneously like language was assailed by Jhering. He observes pungently that according to the historical school, the Roman law of debtor slavery grew in the same way as “the grammatical rule that *Cum* governs the ablative.”

Jhering inspired the sociological school of Jurisprudence. One of his disciples, the Russian Prince Leo Gallitizin, referred to Jhering as the Prometheus who had brought the light of jurisprudence to mankind. Jhering's call for the creation of a “living law” was taken up by his disciple Eugen Ehrlich. Ernest Fuchs, leader of the German free-law school, who stood for the principle of allowing

absolute freedom to judges to decide, untrammelled by rules of law, according to their social intuitions, derived his inspiration from Jhering. The American School of Sociological Jurisprudence was also greatly influenced by the work of Jhering.

Eugen Ehrlich (1862-1922) :—Ehrlich was born in 1862 at Czernowitz in the duchy of Bukowina, which was then part of the Austro Hungarian Empire. He became professor of Roman Law at the University of Czernowitz. Like Savigny, Ehrlich believed that law evolves spontaneously. In his *Sociology of Law* Ehrlich observes : “The great mass of law arises immediately in society itself in the form of a spontaneous ordering of social relations, of marriage, the family associations, possession, contracts, succession... ..”¹. He differs, however, from Savigny in one vital respect. In Savigny’s view law is tied to the primitive consciousness of the people. Ehrlich, on the other hand, locates law in the present-day institutions of society. The fundamental arrangements of society are governed by the basic institutions of the Social order, such as marriage, domestic relations, inheritance, possession, contract etc. While legal provisions are addressed to courts and administrative officials, there is a living law which dominates life even though it may not have been formulated as legal propositions. Ehrlich attached great importance to the study of this living law. “The source of our knowledge of this law”, he declared, “is, first, the modern legal document ; secondly, direct observation of life, of commerce, of customs and usages, and of all associations, not only of those that the law has recognized but also of those that it has overlooked and passed by, indeed even of those it has disapproved.”². This is a truly sociological approach to the problem. One may dispute the appropriateness of Ehrlich’s application of the term law or “living law” to describe the extra-legal controls actually in vogue for the regulation of social relationships. It must, however, be admitted that the sociological method of inquiry insisted upon by Ehrlich is a significant contribution to juristic thought.

Leon Duguit (1859-1928) :—In recent times the French jurist Duguit has made a realistic and sociological approach to juridical problems. He rejects the classical theories of analytical jurispru-

[1] Ehrlich : *Sociology of Law* [Trans. by Nathan Isaacs] 138.

[2] Ehrlich : *Fundamental principles of the sociology of law*. 493.

dence as to the nature of law and completely repudiates the notion of sovereignty. In ' *Law in the modern State* ' he observes : " The idea of public service replaces the idea of sovereignty. The state is no longer a sovereign power issuing its commands. It is a group of individuals who must use the force they possess to supply the public need. The idea of public service lies at the very base of the theory of the modern state. No other notion takes its root so profoundly in the facts of social life " ¹.

In Duguit's view law is the inevitable consequence of social solidarity. Man cannot live in isolation and to associate with his fellows in a social organization. Laws are the expressions of the discipline of society in regard to its members. So, " To speak of a norm as obligatory in a juridical sense means simply that at a given moment.....if this norm is violated the bulk of the people feels that it is just according to the feeling for justice that it forms for itself at this moment, that it (the norm) is necessary for the maintenance of social solidarity, that what there is of conscious force in the group intervenes to repress this violation."

An order issued by the governmental organization in this view, has no inherent or intrinsic claim to obedience. It has to conform to a criterion of justice. This criterion Duguit finds in his conception of social solidarity. Like Kohler's concept of a Natural Law with growing content, and Stammler's Social Ideal, Duguit's conception of social solidarity is meant to answer the insistent demand in recent times, owing to the transfer of interest from individuals to society, that jurisprudence should evolve a technique for the evaluation of positive law.

(3) American Jurists

[A] ANALYTICAL SCHOOL

John Chipman Gray:—Gray, professor of law of real property at Harvard, is a typical representative of the analytical school in America. He defined law as " the rules which the courts.....lay down for the determination of legal rights and duties." This view was expressed by Gray in his "*Nature and Sources of the Law*" which was first published in 1909. It agrees with the definition of law by Salmond in his book on Jurisprudence.

[1] Duguit : *Law in the Modern State* :

[Trans. Frida and Harold Laski) P. XLIV.

[B] HISTORICAL SCHOOL

James Collidge Carter (1827–1903) :—Carter, a prominent New York lawyer, is an American exponent of the ideas of the historical school. His teacher, Cushing, had been a pupil of Savigny and it is likely that Carter thus came under the influence of the historical school in his youth. The seeds of historical jurisprudence planted in youth produced an abundant harvest in old age. There was a proposal for codification of law in New York and David Dudley Field (1805–1894), a follower of Jeremy Bentham, championed that proposal. Carter opposed these proposals in a series of lectures which were posthumously published in 1907 under the title “*Law, its Origin, Growth and Function.*” He contends in this work that codifiers assume the superhuman task of anticipating all future conditions and contingencies and that a code can only impede the organic growth of law.

The arguments of Carter are reminiscent of those of Savigny. Carter categorically insisted that “Human nature is not likely to undergo a radical change, and, therefore, that to which we give the name of Law always has been, still is, and will forever continue to be custom.”¹

[C] SOCIOLOGICAL SCHOOL

Oliver Wendell Holmes, Jr. (1841–1935) :—It is the work of Holmes that gave rise to the realist school of American Sociological Jurisprudence. Holmes was educated at Harvard College. During the Civil War he was thrice wounded while serving in the Militia and rose to the rank of Captain. Graduating from the Harvard Law School, he joined a Boston Law firm. He was a law professor at Harvard for some time in 1882 and was elevated to the Bench of the Supreme Court of Massachusetts. In 1902 he was appointed an Associate Justice of the Supreme Court of the United States. He retired from that Court in 1932. During his tenure on the Bench, he expounded liberal doctrines in his judgments and as his views did not accord with those of the majority of the judges of the Supreme Court, he became the great Dissenter. Holmes died in 1935.

Holmes is known for his prediction theory of law. In a thoughtful address to a body of law students and practising lawyers, he said :

(1) Carter : *Law : Its Origin, Growth and Function*, 120.

“The prophecies of what the courts will do in fact and nothing more pretentious, are what I mean by the law.” This definition stamps him as a pragmatist and a realist. This prediction theory of law has had a pervasive influence upon legal thinking in the United States.

Roscoe Pound (1870-) :—Roscoe Pound was born in Lincoln Nebraska. He was devoted to classics and botany in his youth. In 1901 he was appointed as an auxiliary judge of the Supreme Court of Nebraska. In 1903 he became Dean of the Law School of the University of Nebraska. He was Dean and Carter Professor of Jurisprudence at Harvard University from 1916 to 1936. It was from Harvard that he published a series of articles on Sociological Jurisprudence.¹

Among the advocates of the Sociological method, the name of Roscoe Pound stands pre-eminent. He, more than any other in recent times, is responsible for the growth of the functional attitude in juridical science, the attitude of looking to the working of law rather than to its abstract content, and regarding law as a social institution which it should be our endeavour to improve by conscious and intelligent effort along lines which jurists shall determine as the most efficacious for achieving the ends and purposes to be served. In “*Interpretations of Legal History*,” he observes : “Law is the body of knowledge and experience with the aid of which a large part of social engineering is carried on. It is more than a body of rules. It has conceptions and standards for conduct and for decision, but it has also doctrines and modes of professional thought and professional rules of art by which the precepts for conduct and decision are applied and developed and given effect. Like an engineer’s formulae, they represent experience, scientific formulations of experience and logical development of the formulations, but also inventive skill in conceiving new devices and formulating their requirements by means of a developed technique.”²

Jurisprudence thus becomes a science of social engineering which is concerned with that part of the field of social relations that is capable of regulation by the action of the politically organized society.

1. Pound : *The scope and purpose of sociological Jurisprudence* (1912) 24 Har. L. Rev, 59; (1911) 25 Ibid. Ibid. 140, (1912) 25 Ibid 489.

2. Pound : *Interpretations of Legal History*, p. 156.

[4] THE METHODS OF JURISPRUDENCE

Difference in methodology between the Philosophical and other Schools : The Philosophical method in jurisprudence is the *a priori* method or deductive method. It deduces the fundamental conceptions of law not by the observation of any legal system but from the contemplation of human nature and from surmises ■ to the principles that connect social phenomena. The process by which Kant deduces his definition of law is a typical illustration of the *a priori* method.

The methods of the analytical and historical schools are *a posteriori*. To these schools law is not ■ datum, nor is it an eternal principle which can be discovered *a priori*, that is, by speculative reasoning. By the observation of actual legal systems now in vogue the analytical school deduces its definition of law as ■ rule enforced by political authority. The historical school extends its observation to primitive legal systems as well. The conclusion drawn from such extended observation is that the law of a people like its language and manners forms and develops by itself. Law evolves without the aid of enactments and prescriptions of political authority, much as the rules of the well-known games of a people are formed. These rules establish themselves gradually by the successive resolution of doubtful questions in particular cases. Law is formed by a similar process.

[5] EVALUATION OF THE METHODS OF JURISPRUDENCE

Philosophic method:—Lord Bryce has dismissed the philosophic method with the remark : “ Unless philosophical jurisprudence can help to teach *law that is*, it is of little value.” It is true that the philosophical school deals in such shadowy abstractions and keeps itself so remote from the field of concrete law that we cannot expect much light from it on the complex and controversial questions that agitate the student of any actual legal system. It must not be forgotten, however, that German philosophical speculation rendered to jurisprudence a great service in drawing the attention of jurists to the *purpose of law* and the true basis of its authority. It must be admitted also that the conception of a creative natural law is a valuable contribution of the philosophical method to juristic thought. The defect of the philosophical method, however, lay in the circumstance that it is apt to consider the future of law rather than its past or present.

Historical Method :—While the philosophical method attaches undue importance to the future of law, its past is emphasized by the historical method. There are undoubtedly certain departments of the law in which the historical method is bound to yield fruitful results. Benjamin Cardozo in his '*Nature of the Judicial Process*' observes as follows :

“The law of real property is the readiest example of a field of law in which there can be no progress without history. No lawgiver meditating a Code of Laws conceived the system of feudal tenures. History built up the system and the law that went with it. Never by a process of logical deduction from the idea of abstract ownership could we distinguish the incidents of an estate in fee simple from those of an estate for life. Upon these points a page of history is worth a volume of logic”¹.

The historical school of Germany, however, overdid the emphasis on the evolutionary process behind the law. By regarding custom alone as the type of law and excluding conscious human effort as a factor in legal evolution, the historical school became static and fatalistic. Marx has well said that Savigny was so much preoccupied with the source of law that he almost forgot the stream. The historical method is inadequate for the investigation of the social and professional factors, which by purposive effort give body and shape to the legal system. The chief service of the historical school to jural science consists in showing that law is itself the expression of a juristic process that runs through the ages and that law is itself subject to a law of evolution and is not the arbitrary expression of the will of the law-giver.

Metaphysical and Positivistic methods :—The methods of both the philosophical and the historical schools may be described as metaphysical in character. Auguste Comte has shown in '*The Positive Philosophy*' that there are three stages in the evolution of human thinking. The first is the theological stage in which the explanation of phenomena is found in supernatural causes ; the second is the metaphysical stage in which ultimate principles are invoked for their explication, and the third is the 'Positivistic' stage which confines itself to empirical observation, rejecting all hypothetical or speculative theorizing. It is clear from this analysis that the

(1) Cardozo : *Nature of the Judicial Process*, P. 54.

method of the philosophical school is metaphysical in character and that even the historical method contains a strong metaphysical element. Savigny's view of the 'people's genius' shaping the laws can no more be judged in terms of experience and empirical standards than the Hegelian concept of a Natural law furnishing the basis of legal obligation.

The methods that confine themselves to the data of experience and which may, therefore, be described as 'positivistic' are the analytical and the sociological.

Analytical Positivism :—Analytical positivism has clarified many legal ideas and enabled jurists to distinguish the technical meaning of several legal terms from the popular acceptation. This method, however, confines itself to the well-developed legal systems only and fails even to take one far enough into the past of those systems. On account of this drawback a comparative jurist, Viscount Bryce, has characterized the work of John Austin, the founder of the analytical method, thus: "Most recent authorities are now agreed that his (Austin's) contributions to juristic science are really so scanty and so much entangled with error, that his book ought no longer to find a place among those prescribed for students"¹. Austin's theories, it is true, have been subjected to adverse criticism from many sides, and his style itself suffers from tiresome dogmatism and iteration, but the remarks of Viscount Bryce need not be taken literally. Austin's work is unrivalled as a source of mental discipline to the student who begins his systematic study of scientific jurisprudence.

Sociological Positivism :—Sociological positivism, like the analytical variety, eliminates metaphysical speculation from legal science and makes a strictly empirical approach to legal problems. It replaces rationalism in legal science by empiricism and pragmatism. Its empiricism is shown by its rejection of eternal standards of reason and its pragmatism by the substitution of experimental methods in their place. The precept of the exponents of sociological jurisprudence is: "Judge an idea, a principle, or a rule by its results, that is, by what would happen if and when the idea or rule is actually adopted in practice." The theory that works out better results in actual practice is taken as pragmatically established in preference to theo-

(1) Bryce: *Studies in History and Jurisprudence* VOL. 2, p. 616.

ries that are not fruitful of socially desirable results. It requires no great sagacity to conclude that the future progress of jurisprudence lies in the development of the sociological method.

[6] ENGLISH AND CONTINENTAL SCHOOLS OF JURISPRUDENCE

Continental School is metaphysical :—From the foregoing review of the work of eminent English and Continental jurists it may be concluded that the analytical school is dominant in England while the Philosophical school is predominant on the Continent. Salmond suggests that this peculiarity is traceable to the circumstance that the term corresponding to "law" in Continental languages means not only law but also right or justice. The German word *Recht*, the French word *Droit* and the Italian word *Diritto*, has each this double signification. The connection between law and justice is thus emphasized by the continental nomenclature. Continental jurists are therefore prone to attach a special importance to law in its relation to certain higher ideals which it has to achieve. For this reason Continental jurists have developed philosophical jurisprudence.

The English School is analytical :—In England the existence of different words for law and justice tends to conceal the relation between the two. English jurists are accordingly prone to formulate a theory of law which does not concern itself with justice. They avoid metaphysical speculation confining themselves to the basic concepts of mature legal systems and the law that is rather than speculating upon law as it ought to be. The analytical method is well suited for this purpose and so English jurisprudence largely assumes the analytical form.

The analytical method provides us with a systematic legal terminology by its concentration on definitions and classifications. This in itself is a great service to legal science. One can easily see that nothing but confusion would be the result if like Humpty Dumpty in *Alice in Wonderland* the legist reserves to himself the right to give words whatever meaning he chooses. An agreed terminology is a basic necessity if legal controversy is to be conducted to any useful purpose.

The results of the analytical method are thus most useful to the legal practitioner, for controversy is the very breath of his nostrils. It is no wonder, therefore, that this method should find a congenial

soil in England where lawyers and professionally trained judges are the most powerful contributors to the development of the legal system. Further, the British being a most practical people, avoided the shadowy abstractions of the metaphysical method and adopted the analytical method as the determinant method of Jurisprudence.

(7) Soviet Jurists

Stuchka :—Stuchka was born in Riga in 1865. He was editor of Latvian Social Democratic newspapers from 1888 to 1897. In 1897 his paper was closed and he was exiled to the region of the Volga. After the Revolution he became Commissioner of Justice for the new Republic in 1918. He organized the principal institutional centre of Soviet Legal Philosophy—the “ Section of General Theory of Law and State ” in the Communist Academy—later known as the Institute of Soviet Construction & Law and christened in 1937 as the Institute of Law of the Academy of sciences of the U. S. S. R.

Stuchka regards law as a system of rules for social relationships, which corresponds to the interests of the dominant class and is safeguarded by the organized force of that class. This definition, according to Stuchka, brings out the chief ingredients in the concept of law in general and not of soviet law alone. Stuchka criticises bourgeois jurists who do not bring out the *indicium* of class interest in their definitions of law.

Pashukanis :—The Russian jurist, Pashukanis, was born in the city of Staritsa in 1891. In 1924 he published a work on the “ General Theory of Law and Marxism.” In the Soviet Encyclopaedia Pashukanis’ work was described as a valuable contribution to Marxist legal science. Pashukanis became Director of the Institute of Soviet Construction and Law.

Pashukanis in the “ General Theory of Law and Marxism ” developed the thesis that in a classless society in which the dominant exploiter class does not exist, there is no need for law. He observes : “ The dying out of the categories of bourgeois law by no means signifies that they are replaced by new categories of proletarian law—precisely as the dying out of the category of value, capital, gain and so forth will not mean that new proletarian categories of worth, capital, rent and so forth appear. The dying out of the categories

of bourgeois law will in these conditions signify the dying out of law in general : that is to say, the gradual disappearance of the juridic element in human relations."

The theory of Pashukanis that law should wither away and that no substitute for it is required in a socialist society was denounced as misleading. Stalin pointed out that the Marxist formula as to the withering away of the state was applicable only when all states or the majority of them had become socialist and not while there was only a single socialist state which was threatened with encirclement. Pashukanis tried to correct the errors of his thesis in "The Soviet State and the Revolution in Law." He confessed his errors and observed : "I do not suffer at all from theoretical arrogance. I consider the severest criticism of my work highly necessary. I regret that this criticism came late—it should have been developed far earlier." The mischief, however, could not be undone by a confession of error. *Pravda*, the communist party newspaper, vigorously attacked him as an enemy of the people. Pashukanis was not publicly brought to trial but he was heard of no more.

Vyshinsky :—Vyshinsky was born in 1883 in Odessa. He studied in the College of Law at Kiev University. He was for some time Professor of Law in the Moscow University. In 1936 he came into the limelight as the Prosecutor of the U. S. S. R. in the trials of Zinoviev, Bukharin, Kamenev and other Russian leaders. He became head of the Institute of Law of the Academy of Sciences after Pashukanis' exit from that institution. As a spokesman of Russia in the field of foreign affairs, Vyshinsky now takes rank next only to Malatov, the Russian Minister for Foreign Affairs.

Vyshinsky violently attacked Pashukanis in his Address on "The Fundamental Tasks of the Science of Soviet Socialist law." He said that the latter's "attempts to preach the idea of the inevitable withering away of army and fleet here and now—an attempt, consequently to upset the work of intensifying and making strong our capacity of defence—was aimed at handing our country over into the power of her enemies with her hands tied." Vyshinsky pleaded for the development of a soviet theory of law and state based upon a system of soviet socialist principles which explain the socialist content of soviet juridic disciplines.

Soviet Theory of Law:—In a book published in 1940 and entitled *The Theory of the State and Law* the Russian jurists, Golunski and Strogovich, have endeavoured to sketch the Soviet Theory of Law, as distinguished from the bourgeois theory of law. The shortcomings of the bourgeois schools of law are pointed out by these jurists. The law of Nature School, for instance, declared freedom and equality to be the fundamental principles of natural law. This was the war cry of the bourgeois against decadent feudalism. The freedom which the bourgeois sought was the freedom of capitalistic activity, the liberation of private property from feudal restrictions. The doctrine of Kant, the founder of the Philosophical school, that the purpose of law is to ensure an area of free activity to every individual is viewed by the soviet jurists as a demand that the state should perform mere police functions safeguarding the private property of property owners. These theories are thus regarded as reflecting the class demands of the bourgeoisie. The Historical school is regarded as even more reactionary than the Philosophical or Law of Nature school. Old customs are venerated by the Historical school on the ground that they emanated from the national spirit. The Historical school thus appears to these soviet jurists as the school “which legalizes the abomination of today because it was yesterday’s abomination.”

Soviet Jurists look upon law as a social phenomenon which is linked to the policy of the dominant class in society. Law is the effectuation of the policy of this dominant class in the form of rules of universal obligation which are enforced by the power of the state. “What is the State?” asks Lenin and answers “The state is the organization which compels its members to carry into execution the statutes which it promulgates.” The question “what is a statute?” is answered by Lenin as “the expression of the will of the classes who have gained the ascendancy and hold state authority in their hand.”

To the bourgeois jurists it is a problem whether law preceded the state or state preceded law. The theory that law has precedence is at the basis of the contract theory of the origin of the state. The state is regarded as the product of a contract between the citizens and the conditions of this contract are regarded as binding law upon the state thus brought into existence. This view, as also the view that law is posterior to and created by the state, is erroneous accord-

ing to soviet legal thought. Law and state are not two distinct phenomena, one preceding the other, but are two facets of one and the same phenomenon. That phenomenon is rooted in economics and manifests itself as class dominance. The state is the apparatus of constraint created by the dominant class and laws are the expressions of the will of the dominant class. Vyshinsky points out that according to Marxism-Leninism when a classless society of the toilers and the workers is established throughout the world, it would be possible to consign law and state to the "museum of antiquities together with the axe of the stone age and distaff."

Criticism and conclusion :—The view of the Soviet Jurists that law arises because of the existence of classes in society and of the exploitation of the weaker by the stronger and that law will disappear when a classless society is established is reminiscent of the view of the Hindu sage Narada that "Law comes into existence when Dharma or virtue has decayed among mankind."

The truth, however, seems to be that it is not the decay or failure of Dharma but the *complexity* of Dharma that has led to the establishment of law. Law is a body of pre-determined rules for the guidance of human conduct. Even in a classless society there would be need for such pre-ordained rules for the regulation of human conduct. It is, therefore, submitted that law which is coeval with human society will continue to exist so long as human society itself endures.

Ubi Societas ibi lex

PART TWO

State and Sovereignty

“ If there were no public power, one man would swallow another whole.”

Hebrew Proverb.

“ Progress has consisted, not in the elimination of force, but in its socialization.”

Jethrow Brown
“ Modern Legislation ”

CHAPTER IV

NATURE OF THE STATE

INTRODUCTORY

The beginnings of law may be traced to that stage in social evolution when a human community organizes itself into a political society. Before the attainment of that stage, the members composing the society settle their disputes usually by an appeal to brute force. Laws or binding canons of human conduct enforced by judicial authority could then have existed, if at all, only in a rudimentary form. Law, properly so called, follows the organization of a political society. A politically organized society, otherwise called a State, has to co-ordinate the activities of its members and protect their interests by the maintenance of peace and the administration of justice. Laws are the rules devised by the organized society or state to secure these ends. So, before we undertake an inquiry into the precise nature of law, it is necessary to analyse the conception of State.

(1) GARNER'S DEFINITION

Garner in his *Introduction to Political Science* defines a state as follows :

“The state, as a concept of political science and constitutional law, is a community of persons more or less numerous, permanently occupying a definite portion of territory, independent of external control and possessing an organized government to which the great body of inhabitants render habitual obedience.”¹

According to this definition the essential elements of the state are four in number: population, territory, organization and unity.

Population :—An uninhabited portion of the earth taken in itself cannot be designated a state. The existence of a population is integral to the conception of the state since a state is nothing but a politically organized community.

It is not necessary for the recognition of its statehood that a particular community should have any definitely fixed minimum of membership. All that is necessary is that “the population must be sufficient to provide both a governing body and a number of persons

[1] Garner: *Introduction to Political Science*. p. 41.

to be governed, and of course sufficient to support ■ state organization.”¹

Territory :—A community aspiring to statehood should be in settled occupation of ■ definite territory. A nomadic tribe cannot be considered to be a state. Holland defines a state as “a numerous assemblage of human beings, *generally* occupying ■ certain territory’ among whom the will of the majority or of an ascertainable class of persons is by the strength of such a majority or class made to prevail against any of their number who oppose it.”² This definition does not emphasize the fact that ■ state is associated with a fixed abode. The modern conception of state involves, however, a territory or defined portion of the earth’s surface over which the state is supreme.

Organization :—It is essentially implied in the definition of a state that its members have organized themselves and owe allegiance to a common government. A mass of people occupying a defined territory do not automatically form a state. They have to set up an agency through which they can express their collective will, and whose expressed will binds the members of the community and can be enforced against them, if necessary, by force. The existence of a superior coercive power to which habitual obedience is rendered by the bulk of the community is said to be the *positive mark of sovereignty* of the state or the mark of internal sovereignty.

In organising a state it should be borne in mind that at least since the time of Aristotle it has been the constant postulate of political philosophy that the functions of the state are to be divided into three categories—Legislative, Executive and Judicial. The legislature makes the laws, the executive carries them out and the judiciary interprets them and applies them to particular cases. The investigation of the possible relations that may subsist between these organs of the state is the special province of the science of Politics.

Unity :—The state is a unit by itself. Its territory should not form part of ■ wider political unit. In other words, the political society in question should be independent and should not be subservient to any outside authority. This is regarded as the negative mark of sovereignty or the mark of external sovereignty.

These are the salient features of a modern state.

[1] Garner: *Introduction to Political Science*: p. 68

[2] Holland: *Elements of Jurisprudence* p. 40

(2) SALMOND'S DEFINITION

Definition by reference to function :—Salmond defines a state as “A society of men established for the maintenance of order and justice within a determined territory by way of force.”¹

Salmond distinguishes a state from other human associations by emphasizing the peculiar function necessarily associated with a state, namely, that of maintaining order and justice within its boundaries. Of the several functions undertaken by the state, the administration of justice is so vitally important that it may be regarded as the essential mark of statehood.

The functions of the state :—It will conduce to clearness of thought to observe the functions of the state under two heads : the *Constituent* functions, and the *Ministrant*. Under the first category we place those primary and indispensable functions of the state which are essential for the preservation of the bonds of society. These functions have for their aim the protection of the life, liberty and property of the subject and the maintenance of the civic organization of society. Under the *ministrant* functions we range those secondary functions which are undertaken for advancing the general interests of society and assisting the social organization. These, unlike the *constituent* functions, are *optional* being necessary only according to standards of expediency or convenience and not according to standards of existence.

The Constituent Functions : -Historically the primary and essential functions of government are war and the administration of justice. The avowed end and purpose of political organization is to ensure the stability and cohesion of the community by providing for defence against its external enemies and maintaining orderly relations among its members. The state is preserved from external danger by the waging of war, while its disintegration as a result of the activities of lawless elements within the body politic is prevented by its judicial activity or the administration of justice.

Defence Compared with dispensation of justice :—Salmond observes that these two functions of the State—war and the administration of justice—“are different species of a single genus.” They both involve the utilization of the coercive organization of society for the vindication of what the state regards as right and just.

[1] *Salmond: Jurisprudence* (10th Ed.) p. 132

While in war the state strikes at an external enemy to prevent his encroachments, in the administration of justice it exerts its power over an internal enemy to prevent intestinal dissensions.

While these primary functions of the state may be assimilated in root analysis, they have well-marked differences which should not be overlooked. The administration of justice, as Salmond points out, involves the *judicial* use of the force of the state, while war represents its *extra-judicial* use. When it embarks on war the state is not bound to have any trial or adjudication before setting its coercive apparatus in motion. In administering justice however, it is bound to insist on the formal judgment of a court before reaching out for the offender,

Judicial and Extra-judicial Force :—The features of distinction between judicial and extra-judicial force are note-worthy and have been carefully pointed out by Salmond. Judicial force, in the first place, is regulated by law, since justice has to be rendered in accordance with the law of the realm. For this reason it is applied through a competent tribunal after the ascertainment of the mutual rights of parties by a fair trial. Extra-judicial force, on the other hand, is exempt from the control of law. When international law is ineffective, the only restraint in war is the good sense of those who are parties to it. The force of society, moreover, is applied by the state directly without reference to any judicial body. Secondly, judicial force is exercised against private persons. For this reason the element of force in it is usually latent or dormant. The persons against whom justice is administered are so completely in the power of the state that the threat of the use of that power is generally sufficient to reduce them to submission and obedience. Extra-judicial force, however, is exercised against other states. In the absence of a striking disparity of power, a state seeking to impose its will on another is usually obliged to have recourse to force. For this reason the element of force is strikingly in evidence in war. Sometimes the state has to war against its own subjects as in putting down a rebellion. Here too the use of force is obvious, and the force employed is extra-judicial. Lastly, judicial force is employed against internal enemies who, being members of the body politic, are entitled to the administration of justice at the hands of the state. Extra-judicial force is directed against external enemies who stand beyond the pale of the community and can have no claim to the services of its judicial tribunals.

The Ministrant Functions :—The secondary functions of the state fall into two classes. The first consists of such forms of state activity as legislation and taxation which are the principal means whereby the state is enabled to discharge its primary functions. Legislation is the formulation of rules for regulating the relations of the members of the society for facilitating the administration of justice. Taxation is the instrument by which the state obtains the revenue which sustains all its activities.

The second class of secondary functions comprises all other forms of activity undertaken by the state to serve the convenience of society. These functions of government have a tendency to multiply in modern states and the object of their administration is to help society on to all its ends, to speed and facilitate all social undertakings.

Hall-mark of Statehood : From the foregoing discussion it would be clear that of the activities of that human association which we call a state, administration of justice is of transcendental importance. It is *the* constituent function of the state. Mankind may succeed in abolishing war as a means of settling international disputes. Then organizing for defence would cease to be a primary function of the state. Administration of justice, however, would continue to be the *sine qua non* of statehood.

(3) STATE DISTINGUISHED FROM COGNATE CONCEPTS

The term 'State' has to be distinguished from 'Society', 'Government' and 'Nation' with which it is often confused.

(i) State and Society :—The state does not exhaust the whole range of human activity. Man being essentially, as pointed out by Aristotle, a social animal, enters into various human relationships. The family, the trade guild and the religious brotherhood are all manifestations of the gregarious instinct of man. The whole complex of such social relationships is comprehended in the conception of society. The state is itself one of the greatest and most beneficent of social institutions which, by holding society together, has rendered possible the vast system of social relations which human activity has constructed without any direct action on the part of the state itself. It concerns itself, however, only with the political or legal relations by which men are bound together. 'Society', which suggests the whole range of human relations and collective activities, is thus a

term of wider significance than 'state'. Besides, the term society may be applied to all human communities, whether organized or unorganized, while the term state is restricted to communities politically organized under a government.

Totalitarian States :—One of the remarkable developments of this century is the emergence of totalitarian states which identify state with society and regard the sphere of state activity as conterminous with the function of society. Russia, and till recently Germany and Italy, have been the protagonists of this creed and have gone to intolerable lengths in trenching upon the liberty of the individual by their sweeping activity embracing all aspects of the life of their subjects.

(ii) State and Government :—"The State is," observes Prof. Laski, "for the purposes of practical administration, the government; in England, that is, the state in its daily appearance is the king in Parliament"¹. While it is true that the state and the government are identified in the popular imagination, it should be noted that there is a very vital distinction between them. The term 'government' is narrower than the conception of 'state.' It refers to that group of persons in whom the constitution of the state vests the power of directing the activity of the body politic. The agents of the state through whom it discharges its function, particularly that of enforcing law and maintaining peace, are compendiously described as the 'government' or the 'executive.'

(iii) State and Nation :—The terms Nation and State represent two distinct conceptions.

A State is a political or legal concept signifying a society of men living under one government. Its population may be made up of heterogeneous elements belonging to many different races, professing different faiths and speaking different languages. Thus the United States of America, whose title to statehood can hardly be disputed, consists of numerous race elements—Teutonic, African, Irish, Italian and Scandinavian—having credal and linguistic differences.

The term 'Nation,' on the other hand, has usually a racial or ethnic significance. A perfect nation is a society of men who have a common racial origin, speak the same language, adhere to the same religion, and have a common civilization. The co-existence of all these common bonds is not, however, a *sine qua non* of nation-

(1) Laski: *Grammar of Politics*: p. 131.

hood. Identity of race is not regarded by many political writers—Garner, Sidgwick, Burgess and others—as an essential element in the conception of Nation. Religious freedom is now so fully recognised in every civilized state that community of religion need no longer be looked upon as indispensably requisite for national unity. Community of civilization and a common historic past coupled with permanent settlement in a territory having geographical unity are capable of developing a sense of nationality. In fact, Prof. Sidgwick observes that what is really essential to the modern conception of a Nation is merely “that the persons composing it should have, generally speaking, a consciousness of belonging to one another, of being members of one body.....When they have this consciousness we regard them as forming a ‘Nation’ whatever else they may lack ; thus we should speak without hesitation of the Swiss Nation, because we attribute to the Swiss this community of patriotic sentiment, in spite of differences of language and religion ”¹.

A State may embrace a number of nations and a nation may be split up among a number of states. The tendency of historical development, however, has been “in the direction of identification, that is, towards the organization of states with boundary lines coincident in a general way with those of nations”².

(1) *Sidgwick : The elements of Politics : p. 224.*

(2) *Garner : Introduction to Political Science : p. 49.*

CHAPTER V.

CLASSIFICATION OF STATES

(1) ARISTOTLE'S CLASSIFICATION

Aristotle divided states into two classes, namely good and bad or true and perverted. The criterion of differentiation which he adopted was the spirit animating the government. In each of these two classes Aristotle found three types depending upon whether the government was in the hands of one, ■ few or many and he further found that all states went through ■ cycle of evolutionary changes.

A state, according to Aristotle, begins with the finest type of government—the rule of one man whose political authority is acknowledged on account of his supreme virtues and great ability. This was the *Monarchy or Royalty*. After a time, although the political virtues are absent, the rule of one man would remain, his power being maintained by force. This type of government Aristotle called the *Tyranny or Despotism*. The tyrant would one day meet the opposition of a body of righteous men who would overthrow his power and rule in his stead. This was *Aristocracy*. In its corrupt form, when the rule of a few continued, but was not based on political virtue, this type of government Aristotle described as *Oligarchy*. In time this would be overthrown by a popular uprising and the oligarchy superseded by the rule of the many. This is *Democracy*. In Aristotle's view Democracy is identical with mob rule and is therefore considered by him as degenerate by nature. Out of the turmoil a hero raises himself up, ■ supremely virtuous man capable of restoring order and reason. The cycle is thus completed and begins all over again.

Aristotle considered that there should be ■ type of government sufficiently stable to break the cycle. He felt that the ideal type of government is the golden mean between Monarchy and Aristocracy. This he called the *Polity* which represented essentially the rule of the middle class.

(2) MODERN CLASSIFICATION

Aristotle's classification, though instructive, is not adequate in view of the complicated political organizations which we see to-day. A more elaborate analysis is now necessary and to this we accordingly turn our attention.

The true criterion of differentiation between states, which affords a sure basis for their classification, is to be found in the structural peculiarities of their governmental organization. Adopting this principle the basis of our classification is found under five heads.

(A) CLASSIFICATION BASED ON THE NATURE OF THE CONSTITUTION

(i) Written and unwritten constitutions

A state has either a written constitution or an unwritten one. This is not a useful distinction for there is no constitution which is entirely unwritten and no constitution entirely written. A constitution entirely written is one in the form of a document to which is attached a special sanctity. The constitution of the United States is of this description. An unwritten constitution is one which has grown mainly upon the basis of custom and conventions. The constitution of great Britain is of this type.

(ii) FLEXIBLE AND RIGID CONSTITUTIONS

A state has either a flexible or a rigid constitution. The rigidity or the flexibility of a constitution depends upon the greater or the less difficulty with which it can be changed. This distinction should not be confounded with the division of constitutions into documentary and non-documentary above referred to. A non-documentary constitution, of course, cannot be otherwise than flexible. But a documentary constitution need not necessarily be rigid.

A constitution which can be altered without any special procedure is a flexible constitution. The unwritten constitution of Great Britain and the written constitution of Italy may both be changed by ordinary legislation and are therefore described as flexible. In the United States the process of constitutional law making is not identical with the process of ordinary law-making and so the constitution can be changed only by resorting to a special procedure prescribed by the Constitution. The constitution of the United States is therefore to be regarded as rigid.

Sir Ivor Jennings observes in "*The law and the Constitution*" that the fact that a legislature has the legal right to pass legislation on any subject whatever, and can change the law of the constitution with the same ease as any ordinary law, does not necessarily imply that the constitutional frame work of the state is flexible in any but a purely formal sense. He points out that before the introduction of far-reaching reforms in the electoral system by the Act of 1832, the British constitution was really very rigid for constitutional changes had to be approved by a king and two unrepresentative Houses of Parliament. The real test, therefore, of the flexibility of a constitutional structure is the ease with which new ideas, accepted by a substantial majority of the people, can be reflected in the framework of the state.

(B) CLASSIFICATION BASED ON THE NATURE OF THE STATE

Under this head we have to notice Unitary and Federal States, dependent and Independent states as well as Semi-Sovereign states.

(i) UNITARY STATE

Unitarianism :—A unitary state is one the constituent units of which are not themselves states. The entirety of sovereign power vests in such a state in one central authority, that is to say the supreme legislative body. The power of law-making can be exercised in a unitary state only by one legislative authority. The principle of government by which the supreme legislative power of a state is allowed to reside in one central authority is known as unitarianism.

Test : One legislature at the apex of Law-Making bodies :—It is quite consistent with unitarianism to have within the state well-developed autonomous local governments. The power of such local divisions should, however, be purely subordinate and delegated power which may always be modified by the sovereign legislature. To take an illustration, Great Britain affords a typical example of the Unitary State. Here the Parliament is the sole repository of sovereign power. Other bodies such as the County Councils also possess law-making powers. But this power was conferred upon them by Act of Parliament and at any time another Act of Parliament can take it away. The Parliament is thus at the apex of the law-making authorities in Great Britain. A state is said to be unitary when it possesses a single sovereign organ exercising dominion over the entire territory

comprised within the state. Judged by this test, Great Britain is a Unitary State.

(ii) CONFEDERATION

Nature of Confederation:—A confederation is constituted by a number of sovereign states forming a union by means of a treaty for purposes of mutual co-operation or defence. In a confederation the member states retain sovereignty and the common government set up by the Union is only their delegate whose power may be revoked at any time by the constituent states. Examples of confederation are provided by the Netherlands from 1580 to 1795, the United States of America from 1778 to 1787, Switzerland before 1848 and Germany from 1815 to 1866. The confederate form of government has not proved a success. Confederated states do not exist at the present time.

(iii) FEDERAL STATE

(a) Federal State compared with other types of State Structure

Distinguished from Unitary State:—A Federal state has a more complicated political organization than a unitary state. It is a composite state and its constituent units are themselves states. The constituent units taken in isolation are capable of functioning as states for they also possess an independent legislative machinery and ancillary agencies.

Distinguished from Confederation:—A federal state is a perpetual union of states in which sovereignty is distributed by the constitution between the constituent states and the federal government set up by their union. The Federal state and the member states have to function in their respective spheres as delimited by the constitution. The Federal state has the power to declare war, make peace and to conclude treaties and the member-states exercise governmental power within their own territories enjoying a large measure of autonomy. In a confederation the member-states alone are sovereign. The authority of the confederation is terminable at the will of the constituent units and so it cannot be regarded as having sovereignty. In a federation both the federal state and the member-states are sovereign, each being sovereign in its own sphere.

Existing Federal Constitutions:—The principal federal states in existence are the United States of America since 1787, Switzerland since, 1848, Mexico, Argentina, Canada, Brazil, Venezuela, Australia and the Union of Soviet Socialist Republics.

India: Quasi-federal constitution:—The Indian constitution is quasi-federal. As in a federation legislative power is divided between the Union and the member-states. One of the basic principles of federalism is that the division of powers between the federal centre and the states should not be allowed to be disturbed by the unilateral action of the federal or the state authorities. Thus in the United States it is not possible for the federal authority to transfer to itself any of the powers belonging to the states nor to suspend the working of the state governments. In the Indian constitution, however, the President can proclaim an emergency and then the Union Parliament can legislate even on matters which are in the state legislative list. Thus in times of emergency the Union Government at the centre can convert itself into a unitary state. For this reason the Indian constitution may be described as a quasi-federal constitution.

(b) Features of the Federal State

(1) Federal Compact:—The first thing that we notice about a federation is that it arises out of a compact between sovereign or autonomous states. The compact or covenant creates the federation. It is thus usual for a federation to have a written constitution. The constitution thus made is to be supreme. Every authority existing under the constitution would be controlled by the provisions of the fundamental federal compact. This supremacy of the Constitution is a striking feature of federalism.

(2) Division of Sovereign power :—The principal purpose of the federal compact is to divide the powers of Government between the federation created by the compact and the member units of the federation. In the federal sphere and in the sphere of state government, the three departments of the executive, the legislature and the judiciary are set up and their respective provinces are precisely demarcated by the covenant of the constitution. Each of these departments has a limited sphere of authority, but each is supreme in its own sphere. "This distribution of limited executive and judicial authority among bodies each coordinate with and independent of the other", to use the words of Dicey, "is of the very essence of federalism."

The actual distribution of powers between the Federal centre and the States is a matter which depends upon the peculiarities of historical development of the particular federation. No two federations need be alike. In fact if they were, as Prof. Marriot says, one

or the other of them would soon prove itself a failure. In the United States constitution, specific powers are given to the Congress or the Federal Legislature and the residue of power is reserved to the States. The Swiss Federation has adopted the same method. This process of the division of powers was reversed in the Canadian Constitution by specifically delegating certain enumerated powers to the provinces and leaving the residuary powers to the Federal Parliament. Later, the Australian Federation reverted to the American practice.

The distribution of sovereign powers between the federation and the part-states constitutes the second characteristic feature Federalism.

(3) Rigidity of constitution :—The third feature of federalism is ■ limitation by statutory declaration of the federal and state governments to disturb the distribution of power originally made by the constitution. This brings us to the question of the amendment of the constitution. This amending power cannot obviously be vested in the states, for the power of the federal government would then become an illusion and a mockery. Nor can the federal legislature have this power for then there would be no guarantee of the rights reserved to the states by the constitution. The amending power should therefore rest outside the constitution. By Article 5 of the United State Constitution, this power is vested in a constitutional convention called on the application of the legislatures of two-thirds of the several states at any time belonging to the Union. The law of the constitution can thus be changed only by some authority above and beyond the ordinary legislative bodies, whether federal or state legislatures, existing under the constitution. From this consideration arises the third important feature of federation, namely, that a federal constitution is bound to be an 'inexpansive' or 'rigid' constitution.

(4) Right of Judiciary to question legislative competency :—We have seen that governmental powers are divided in a federation between the central and local organs. The question now arises as to how this division is to be practically maintained. Who is to decide whether any of the organs of government has trespassed its constitutional limits; who is to pronounce upon the constitutionality of the acts of the federal and state legislatures?

The function is usually left to the courts in a federation. The courts are the interpreters of the constitution. In other words, the

demarcation of power between the federation and its units is a justiciable demarcation. This is a fourth feature of federalism.

The justiciable demarcation of authority in a federation leads to one important result, namely, that the courts of law can treat as invalid any enactments of either the central or the local legislature that conflict with the clauses of the Constitution. In order that the state courts may not wrest the law in favour of state rights, a Supreme Federal Court is created. This acts as the ultimate arbiter of all matters affecting the constitution. The constitution of the United States has made provision for such a court. In the United States, the Supreme Court is the final appellate authority from the decisions of the subordinate federal tribunals and also from the decisions of the highest court of any state. If a party to a case in the highest court of a member state bases his claim or defence upon some provision of the Constitution and gets a judgment in his favour, there is no right of further appeal. If judgment goes against him, he can appeal to the Supreme Court. The state courts are thus encouraged to act as the guardians of the constitution and the Supreme Court is entrusted with the final say in all matters relating to the constitution.

Peculiarity of Swiss Federalism :—A justiciable demarcation of government function is usually considered to be a characteristic feature of federalism. But it is submitted that it would be wrong to consider this feature as the *sine qua non* of federalism. The Swiss federation, for instance, does not exhibit this feature. Here the federal tribunal cannot pronounce to be unconstitutional any act of the Federal Legislature. The Swiss Federal Assembly is the final arbiter on all questions as to the respective jurisdictions of the executive and of the federal court.

The absence of a justiciable delimitation of powers between the federal and cantonal governments in Swiss federalism may lead one to conclude that the Swiss Federal Assembly unlike the U. S. Congress, is an exclusively sovereign body and that, for this reason, the Swiss constitution does not embody the principle of federality. This conclusion involves the assumption that the federal assembly may trench upon the constitution unchecked on account of the absence of provision in the constitution for a co-ordinate judiciary standing on a co-equal footing with the federal assembly. The conclusion and the assumption which it involves are both erroneous. The

CLASSIFICATION OF STATES

truth is that the Swiss constitution has, by other means than the creation of a co-ordinate judiciary, precluded the possibility of encroachment upon its Articles by the federal legislative body. In the Swiss constitution no legal revision can take place without the assent both of a majority of citizens and of a majority of the cantons. Moreover, an ordinary law duly passed by the Federal Assembly may be annulled by a popular veto. The constitutionality of a piece of legislation is determined by means of a referendum. It is, therefore, not necessary for the courts to act as the guardians of the constitution. The electorate which is the ultimate Sovereign power in the Swiss Federation, is a vigilant and alert authority and may be trusted to its own direct action for maintaining its rights and keeping the federal and cantonal legislatures well within their constitutional limits.

Summary ;—We may now sum up the essential features of federalism. A federal state is a device to reconcile the sentiment of state loyalty with the desire for national solidarity. It sets up a dual political organisation—the federal authority to look after interests which are common to the states, and the state authorities to look after matters of individual concern to the states. Thus the people in a federal state are under a divided allegiance, the civic duty of the citizen being to obey either authority in its own sphere. In the words of Prof. Sidgwick: “This habit of divided allegiance is an essential characteristic of a well-organised federal state, as contrasted, on the one hand, with a unitary state, and on the other hand, with a confederation of states.”

Secondly, a federal state originates in a compact between autonomous states and has usually a written constitution. Thirdly, the constitution is alterable only by special procedure, and is therefore, rigid and inflexible. Fourthly, the constitution is supreme and the courts are its interpreters. These are some of the most striking of the features of well-developed federalism.

(iv) IMPERIAL STATES

Distinguished from Federal State :—An imperial state resembles a federal state in some respects, for, both belong to the category of composite states. Unlike a unitary or simple state, Imperial and Federal states are both composed of a group of constituent states. There is, however, a distinction between the two. In an imperial state the constituent states are strictly subordinate to the central and imperial government. England, with her colonies is an illustration

of an imperial state. Its essential basis is the supremacy of the British Parliament. The possession by the common or central government of the entire sovereignty of the composite state is the hall-mark of an imperial state.

A federal state, as already explained, effects a division of Sovereignty or the totality of governmental powers, between the central or federal government and the local governments of the Constituent states. Herein lies the essential difference between it and an imperial state.

(V) DEPENDENT AND INDEPENDENT STATES

An independent state exhibits both the internal and external marks of sovereignty. It is a unit by itself and acknowledges no higher authority in its internal or in its external affairs. A dependent state, on the other hand, is one which is subordinate to the government of a larger state of which it is a part. Whether a dependency has a valid claim to be styled a state is a point open to doubt, but Sir John Salmond has answered it in the affirmative. A part of a thing may be called by the same name as the whole if both possess the same essential nature. As Salmond aptly remarks: "A part of a rope is itself a rope if long enough to serve the ordinary purposes of one." So a territorial division of a state may itself be called a state if, taken by itself, it possesses the essential organisation and fulfills the primary functions of a state.

(VI) HALF-SOVEREIGN STATES

A state with full internal autonomy, but whose external affairs are regulated by a superior state, is sometimes referred to as a Half-sovereign state. John Austin has shown that such a state is either (1) wholly subject, (2) perfectly independent or (3) jointly sovereign with the other. The first of these he illustrated by the Indian Native States, which when they were subordinate to the British government habitually obeyed the commands conveyed through the British resident. An illustration of the second Austin found in the position of Frederick the Great of Prussia, who, though a feudatory of the German Empire, was practically independent of the Imperial government. The British self-governing Dominions with their independent legislatures illustrate the third type.

Austin, therefore, concludes that no state can be sovereign and subject at once or be styled as a Half-sovereign state.

(C) CLASSIFICATION BASED ON THE NATURE OF THE LEGISLATURE.

(1) States may be divided into two classes according to whether the legislature is unicameral or bicameral. This classification is not very fruitful. It would put all the important states in one category and all the unimportant states in the other, since most of the former have legislatures consisting of two chambers.

(2) We may classify states on the basis of the electoral system by which the Lower House is constituted. On this basis states fall broadly into two sorts—viz., those which have manhood suffrage and those which have adult suffrage. Manhood suffrage means that all males above a certain age, without qualification, (apart from the usual disfranchisement of paupers, criminals, lunatics etc.,) possess the right to vote. By adult suffrage is meant the same right enjoyed by both males and females.

States may be divided with reference to the nature of the Upper House. The second chamber is either elective or non-elective. Among the best known of the elected Upper Houses are the Senate in the United States, the Council of the Republic in France and the Senate in Australia. The most noteworthy instance of a non-elective second chamber is the House of Lords in Great Britain. The second chamber may also be partly elective and partly non-elective, as in the case of Spain and Japan.

(D) CLASSIFICATION BASED ON THE NATURE OF THE EXECUTIVE

States may also be divided on the basis of the nature of their executive. The supreme executive may be directly responsible to the legislature and liable to be dismissed from office if its policies are rejected by the legislature. The state has then what is called a Parliamentary Executive. Where this is not the case, the state has a non-parliamentary or fixed executive and of such states the United States is a conspicuous example.

[E] CLASSIFICATION BASED ON THE NATURE OF THE JUDICIARY

States may be divided into Prerogative States and Common Law States. In the former the executive is protected by a special system of administrative law, of which the DROIT ADMINISTRATIF of France is a typical example. Officials transgressing the law are triable by special departmental courts called administrative courts and the plea

of state necessity can be raised by the officials in extenuation of their acts. Where the State official has no special protection and official acts may be adjudicated upon in the ordinary courts, the executive is said to be subject to the operation of the "*Rule of Law*". Such states, of which Great Britain is a conspicuous example, are called **Common-Law States**.

CHAPTER VI

MEMBERSHIP OF THE STATE

[1] CITIZENS

Citizenship or Nationality :—Jurisdiction over persons, as distinct from jurisdiction over land, sea and air, is claimed by states under two different theories. Under the rule of *Jus soli* (right of the soil), most states claim as nationals all persons born within their territorial limits. Under the rule of *Jus sanguinis* (right of the blood) some states claim children of their nationals, wherever born, as their nationals by virtue of parentage. The question of nationality is determined by municipal law.

Germany and France, for instance, follow the first of these rules, so that a child born of their subjects becomes *ipso facto* by birth their subject likewise, be the child born at home or abroad. According to this rule, illegitimate children acquire the nationality of their mother. There are some states, such as Argentina, which have adopted the second rule and consider that the territory on which the child is born is exclusively the decisive factor in determining nationality. Again states such as Great Britain and the United States have adopted a mixed principle. Thus British nationality may be acquired not only by birth in the British dominions, but also by descent from a father having British nationality.

Double Nationality :—Since the nationality laws of the various states are not uniform, some adopting the rule of *jus soli*, some the rule of *jus sanguinis* and others a mixed principle, it is possible for an individual to be a national of two states simultaneously or not to have any nationality at all.

Suppose a child is born in the United States of French parents who were temporarily residing there. The child would be a native born citizen of the United States because it was born in its territory. It would be likewise a citizen of France because of its parentage. Again, some individuals may be found to be destitute of nationality.

Thus an illegitimate child born in Germany of an English mother would be destitute of nationality, because according to German Law it does not acquire German nationality and according to British law it does not acquire British nationality.

Naturalization and Expatriation :—Almost all states now permit the citizens to expatriate themselves, i. e., to become nationals of other states and also provide for 'naturalization' of foreigners who desire to become citizens of the local state. A naturalised citizen is one who has relinquished his citizenship of nativity and has acquired citizenship in a state other than that of his birth. Naturalization is thus a means by which an individual effects a change in his national character.

(2) ALIENS

An alien falls under the territorial supremacy of a state as soon as he enters its territory. For this reason, a state can treat aliens according to its discretion, except in so far as its discretion is restricted by international treaties, apart from the protection of person and property. Thus it is usual for states to exclude aliens from certain professions and trades or from holding immovable property or to compel them to register their names for the purpose of keeping them under control.

Extradition of aliens :—Aliens who are fugitives from justice may be delivered up to the authorities of the state from which they have fled by the process of extradition. Extradition is provided for by treaties which specify the crimes for which extradition shall be granted and the categories of persons subject to extradition. Political crimes, short of attempts at assassination, are normally not treated as extraditable offences and are exempted by specific provisions of such treaties.

Jurisdiction over aliens for offences committed beyond state territory :—Where an act committed by an alien produces injurious consequences inside a state's territory, such state may assume jurisdiction over the foreign perpetrator if he happens to enter its territory. This was decided by the Permanent Court of International Justice in the well known case of the *Lotus*.¹

(1) *The Steamship Lotus* (1927) P. C. I. J. Series A. No. 10 *Hudson cases*, P. 719.

A collision took place between a French ship, the *Lotus*, and a Turkish ship, the *Baz Kourt* on the open sea as a result of which the Turkish ship sank with loss of life. The *Lotus* after the incident proceeded to the Turkish port Constantinople, where the officers of both ships were indicted and convicted of manslaughter. The French Government made diplomatic representations for the release of the French Officer and claimed exclusive jurisdiction over acts committed on its ships on the high seas, but the Turkish government claimed jurisdiction over foreigners, who committed acts against Turkey or Turkish subjects, under their Penal Code. The matter was referred to the Permanent Court of International Justice. It was held that the Turkish Court had jurisdiction and that the criminal proceedings instituted by Turkey were not in conflict with international law, since the act of the French Officer "produced in its effects on the Turkish vessel and consequently in a place assimilated to Turkish territory."

Resident aliens :—(Residence : a title to state membership):— A distinction should be drawn between such aliens as are merely travelling and staying only temporarily on the territory and such as take up their residence there permanently or for some length of time. A state has wider power over aliens of the latter kind. It can make them pay rates and taxes and can even compel them in case of need to serve in the local police for the purpose of maintaining public order. In fact, the tendency of the states is to treat resident aliens more and more on the same footing as nationals, political rights (such as voting) and duties (such as compulsory military service) of course excepted.

Comparison of Nationals with domiciled aliens :—The title to state membership is twofold. One is citizenship; the other is residence. Citizenship (also called nationality) was the first title of state-membership to be recognised. The reason for this is simple. The state developed out of the nation. A nation by setting up a political organisation endowed with the attributes of sovereignty becomes a state. Then the fellow-nationals become fellow-citizens. Originally the state had concern only for its citizens and took no notice of aliens. In course of time aliens also acquired a civil status respected by the law and were treated as falling within the jurisdiction of the state when resident upon its territory. Thus residence *per se* became a title to state-membership.

It should however, be borne in mind that though nationals and domiciled aliens are equally members of the state, nationality, because of the political privileges that go with it, may be regarded as decidedly the superior title of state-membership.

A citizen is under a permanent allegiance to the state. Allegiance is the duty of submitting to the will of the state so that it may fulfill the purposes of its existence, namely, the defence of the community against aggression, both external and internal. Even when he leaves the boundaries of the parent-state and goes to a foreign state, he carries his allegiance with him. Any breach of this duty of allegiance is a grave offence known as treason. A resident alien, however, owes only a temporary allegiance to the state where he is resident. When he leaves the state, he leaves his allegiance behind. This is the vital distinction between a citizen and a resident alien.

Citizenship is a conception the importance of which is continually diminishing :—The recognition of residence as a distinct title to state membership has undermined the importance of the concept of citizenship. Citizenship is no longer the exclusive title to state-membership. Further, the tendency is to assimilate residence to citizenship in regard to the rights and duties incidental to the status of statemembership. The recent decision of the House of Lords in *Joyce v. Director of Public Prosecutions* illustrates this modern tendency.

*Joyce v. Director of Public Prosecutions*¹ :—William Joyce (popularly known as Lord Haw Haw during the war) was born in America. He resided in England between 1921 and 1939. During this time he applied for and secured a British passport describing himself as a British subject born in Galway, Ireland. During World War II he entered the service of the German Radio Company at Berlin and used to broadcast from that station in the English language. On the defeat of Germany he surrendered to the British at the French frontier. He was made prisoner and was tried for treason. His defence was that he was not a British subject and such owed no allegiance to the British Crown. The plea was rejected and he was sentenced to death. It was held that though by law he was not a British subject, by his own action of getting a British passport and describing himself as a British subject he had created that 'bond

1. 62 T. L. R. 208 (H.L.)

which while he was within the realm bound him to his sovereign.” The Lord Chancellor observed as follows: “The natural born subject owes allegiance from his birth, the naturalized subject from his naturalization, the alien from the day when he comes within the realm. By what means and when can they cast off allegiance? The natural born subject cannot at common law at any time cast it off. *Nemo Potest Exuere Patriam* is a fundamental maxim of the law from which relief was given only by recent statutes. Nor can the naturalized subjects at common law. It is with regard to the alien resident within the realm that the controversy in this case arises. Admittedly he owes allegiance while he is so resident, but it is argued that his allegiance extends no further.....But the possession of a passport by one who is not a British subject gives him rights, and imposes on the Sovereign obligations, which would otherwise not be given or imposed. It is immaterial that he has obtained it by misrepresentation and that he is not in law a British Subject. By his own act he has maintained the bond which while he was within the realm bound him to his Sovereign. The question is not whether he obtained citizenship by obtaining the passport, and whether by its receipt he extended his duty of allegiance beyond the moment when he left the shores of this country. As one owing allegiance to the King he sought and obtained the protection of the King for himself while abroad.....What is this protection on which the claim to fidelity is founded? To me it appears that the Crown in issuing a passport is assuming an onerous burden, and the holder of a passport is acquiring substantial privileges.....Armed with that document the holder may demand of foreign Governments that he be treated as a British subject, and even in the territory of a hostile State may claim the intervention of the protecting Power. I would make it clear that it is no part of the case for the Crown that the appellant is debarred from alleging that he is not a British Subject, The contention is a different one: it is that by the holding of a passport he asserts and maintains the relation in which he formerly stood, enjoying the continued protection of the Crown and thereby pledging the continuance of his fidelity. In the circumstances I am clearly of opinion that so long as he holds the passport he is within the meaning of the statute a man who, if he is adherent to the King’s enemies in the realm or else-where, commits an act of treason.....”

So long as an alien is enjoying the protection of a state, he is bound by the tie of allegiance to that state. In this respect no distinction exists between a citizen and an alien who has once come within the territorial supremacy of the state. Thus the concept of citizenship as the sole and exclusive title to state-membership has steadily lost its vitality.

Conclusion:—From the foregoing discussion the following conclusions emerge:

(1) Allegiance and protection are reciprocal obligations. The full implications of this statement may be noted. Every State is under a duty of receiving on its territory such of its citizens as are not allowed to remain on the territory of other states. The home states of expelled persons cannot refuse to receive them on the home territory, the expelling states having a right to insist upon this being a part of its duty towards the person expelled by them. Then, the citizen is entitled to the protection of his property and person which is secured by the state establishing peaceable relations within the community. In his turn, the citizen is bound to obey his state loyally. He should submit himself to the will of the state so that it may fulfil the purpose of its existence, namely, the defence of the community against aggression, both external and internal. Thus a member of a state owes to his state allegiance and is entitled to its protection. "Allegiance and protection", as Sir John Salmond points out, "are reciprocal obligations"¹. The one is compensation for the other, allegiance for protection and protection for allegiance.

(2) Ordinarily, an alien owes allegiance to a state where he resides only so long as his residence continues; but in exceptional cases when he seeks and obtains the protection of that state even after leaving the state, the obligation of allegiance will also continue.

1. *Salmond: Jurisprudence*, p. 150.

CHAPTER VII

THEORY OF SOVEREIGNTY

(1) INTRODUCTORY

Meaning of Sovereignty :—In its popular sense the term 'Sovereignty' means supremacy or the right to demand obedience. A Sovereign state is one which is subordinate to no other and is supreme over the territory under its control. It issues orders which all men and all associations within its borders are bound to obey. Its independence in the face of other communities is the mark of 'external' sovereignty and its power to exact obedience from its members is the mark of 'internal' sovereignty. Sovereignty is indeed the chief attribute of Statehood. The Legal Sovereign in the state is to be found, according to Bryce, in that authority, be it a person or a Body, "whose expressed will binds others, and whose will is not liable to be overruled by the expressed will of any one placed above him or it."¹

Legal Sovereign and Political Sovereign :—Dicey draws a distinction between the "Legal" Sovereign and the "Political" Sovereign. The political sovereign in a state is that body the will of which ultimately prevails in the state. To its mandates, though they are not and cannot be expressed as legal commands, the legal sovereign, has perforce to bow in practice. In every well-organised democratic state this body is the electorate. The electorate is politically sovereign, for in the long run it is able to enforce its will. These courts, however, do not take any note of the will of the electorate as such. For reason, the electoral body cannot be recognised as having any share in the legal sovereignty. The nature of legal sovereignty will be discussed below.

(1) AUSTIN'S THEORY OF SOVEREIGNTY

The nature of sovereignty is explained by John Austin as follows :—"If a determinate human superior, not in the habit of obedience to a like superior, receive habitual obedience from the

1. Bryce : *Studies in History and Jurisprudence*, VOL. II P. 507

bulk of ■ given society, that determinate superior is sovereign in that society, and the society, including the superior, is a society political and independent.....To that determinate superior the other members of the society are subject ; or on that superior the other members of the society are dependent. The position of its other members towards the determinate superior is a state of subjection or ■ state of dependence. The mutual relation which subsists between that superior and them may be styled the relation of Sovereign and subject, or the relation of sovereignty and Subjection ”¹.

(1) **Sovereign power is determinate** :—According to Austin in every independent political society there is a sovereign power. The chief characteristic of sovereignty consists in the power to exact habitual obedience from the bulk of the members of the society.

(2) **Sovereign power is legally unlimited** :—Austin considers the Sovereign to be the source of law. He says : “ Every positive law or every law simply and strictly so called, is set, directly or circuitously, by a sovereign person or body to a member or members of the independent political society wherein that person or body is sovereign or supreme ”². Law then is the will or command of the sovereign. The sovereign is that authority in the state which can make and unmake any and every law.

The power of the sovereign is *legally* unlimited, for, obviously the sovereign cannot be controlled by any command of his own.

No Dejure limitations :—Austin admits that sovereign power may have *defacto* limitations. The effective power of the sovereign is dependent on two factors : first, the coercive force which he has at his command ; and second, the docile disposition of the people. Since these two things have practical limits, it follows that sovereignty too is limited *de facto*. What Austin denies is that sovereign power can be limited *de jure*. By definition “ The legal sovereign is that person (or body) to whose directions the law attributes legal force, the person in whom resides as of right the ultimate power of laying down general rules or isolated commands, whose authority is that of the law itself ”³. Since the sovereign is

(1) Austin : *Jurisprudence*, VOL. I. P. 221.

(2) Austin : *Jurisprudence*, VOL- I. P. 220.

(3) Bryce : *Studies in Jurisprudence*, Vol, II P. 505.

postulated as the source of law, Austin concludes that there can be no legal limits to the sovereign's power.

Sovereign power is indivisible :—If the power of the sovereign cannot be legally limited, it follows that it is incapable of division. Assuming that sovereignty is divided between A and B, it means that A cannot make a law in respect of certain matters in regard to which the power of law-making is given to B. By definition the sovereign is to have unlimited law-making power. So A is not sovereign. By the same reasoning B also cannot be the sovereign. The whole of the sovereign power must be in A or in B or in A and B jointly, but part of it cannot be in A and part of it in B. According to the Austinian theory there can be only one sovereign in the state, that is to say, one person or one body of persons in whom the totality of sovereign power is vested. Sovereign power, in other words, is indivisible and cannot be shared between two or more persons or bodies of persons.

Summary: Indicia of Sovereignty according to Austin:—Sovereignty according to Austin is to be located in that person or body of persons which can make and unmake any law whatever. The sovereign power is distinguished by its possession of an unrestricted power of enacting and repealing any law, whether the law be an ordinary one or one fundamental to the constitution. A law-making authority which does not exhibit these features is regarded by Austin as a non-sovereign body. Dicey, who follows Austin on this subject, describes the characteristics of a non-sovereign authority as follows : "The signs by which you may recognise the subordination of a law-making body are, first, the existence of laws affecting its constitution which such body must obey and cannot change; hence, secondly, the formation of a marked distinction between ordinary law and fundamental laws; and lastly, the existence of some person or persons, judicial or otherwise, having authority to pronounce upon the validity or constitutionality of laws passed by such law-making body."¹

[2] SALMOND'S THEORY

Sovereign power is determinate :—Salmond is of the view, concurring therein with Austin, that every political society involves the

1. Dicey : *Law of the Constitution*, p. 92.

presence of sovereign authority. He points out that the contrary view ~~can~~ only be based on the supposition that all power in the state is subordinate "and this supposition involves the absurdity of a series of superiors and inferiors *ad infinitum*"¹.

According to Salmond, however, it is not necessary that sovereignty should in all cases be found in its entirety within the confines of the state itself and may, wholly or partly, be external to the state. He points out that in the case of ■ dependent or semi-sovereign state, sovereign power is vested wholly or in part in the superior state. Austin's theory, however, is concerned only with ■ society political and independent or a fully sovereign state. In Austin's view, therefore, the entire sovereign power should reside within the state itself.

Sovereign power may be legally limited :—Sovereignty need not mean unlimited supremacy as supposed by Austin. An authority may be "sovereign" within its sphere for in that sphere its power is uncontrolled. The ambit of this sphere need not be unlimited. Austin erroneously thought that if authority is restricted and confined to particular limits, it cannot be sovereign. Salmond observes that Austin's error lies in confusing the *limitation* of power with its *subordination*. The authority confided to ■ particular organ should be regarded as sovereign if in its own sphere it acknowledges no higher power, though its authority may not extend to other spheres. A sovereign *within its powers* is thus not a contradiction in terms. When Salmond says that sovereignty may be limited, it is not of course suggested that sovereign power may be legally controlled within its own sphere, for that would be ■ self-contradictory proposition. What he maintains is that the province of sovereignty may have legally determined bounds. Within its own ambit, sovereign power must undoubtedly be unfettered, but the Austinian view that this ambit is infinite and has no assignable limits is rejected by Salmond.

Sovereignty is divisible :— According to Salmond, sovereign power is divisible. For instance, it may be divided into legislative, executive and judicial sovereignty, each branch being coordinate with the rest and uncontrolled in its own sphere. Legislative power itself may be divided between two coordinate Legislatures each dealing exclusively with certain topics of legislative power.

(1) *Salmond: Jurisprudence*. (10th Ed.) 490.

Testing the theories :—The relative merits of the rival theories of Austin and Salmond can be tested by reference to the nature of sovereign power in existing political constitutions. If Austin's theory is sound, it should be possible to discover indivisible and unlimited sovereignty in every constitution. This enquiry may be undertaken with reference to a typical unitary constitution like the British Constitution, a typical federal constitution such as the United States Constitution, and a quasi-federal Constitution such as that of India.

(3) SOVEREIGNTY IN THE BRITISH CONSTITUTION

Parliament is Sovereign :—It is now accepted on all hands the sovereign power in the British constitution resides in Parliament *i. e.* in the tripartite body consisting of the King, the House of Lords, and the House of Commons.

Austin's View :—Austin observed : " Speaking accurately, the members of the Commons' House are merely trustees for the body by which they are elected and appointed : and, consequently the sovereignty always resides in the King and the Peers, with the *electoral body* of the Commons " ¹. This view of Austin finds no support with the best writers who have treated of the British Constitution.

Austin's view that the electorate is an integral part of the Legal Sovereign is the result of confusion between *Legal* Sovereignty and what Dicey has termed '*Political*' sovereignty.

As Dicey observes : " The electors are a part of and the predominant part of the politically sovereign power. But the legally sovereign power is assuredly, as maintained by all the best writers on the constitution, nothing but Parliament. " ²

(A) DOES THE BRITISH PARLIAMENT EXEMPLIFY UNLIMITED SOVEREIGNTY ?

Law-making power of Parliament Apparently unlimited :—The legal omnipotence of the British Parliament is indeed unique in modern times. " It is a fundamental principle with English lawyers", said De Lolme, " that Parliament can do everything but make a woman a man, and a man a woman." The only limits to the

1. Austin : *Lectures on Jurisprudence*, P. 253.

2. Dicey : *Law of the constitution*, P. 76.

legislative power of Parliament thus conceived are *physical* limits altogether outside of law.

“The British Parliament,” says Bryce, “can make and un-make any and every law, change the form of government or the succession to the Crown, interfere with the course of justice, extinguish the most sacred rights of the citizen,.....and it is therefore, within the sphere of the law, irresponsible and omnipotent.” Parliament does indeed appear to be the very embodiment of unlimited sovereignty.

Dicey's Illustrations :—Dicey gives the following instances as illustrations of the exercise by Parliament of its supreme legislative authority.

(a) The Union of Scotland Act, 1706, contained certain provisions which were expressed to have continuance for ever. Yet some of them were later repealed.

(b) The Union of Ireland Act, 1830, Provided that the Churches of Ireland and England should be united into one Protestant Episcopal Church of England and Ireland and that the United Church should remain in force for ever. Yet the Irish Church Act, 1869, disestablished the Church of Ireland.

(c) Under an Act of 1694 the duration of Parliament was limited to three years. This statute was in force in 1716 and according to it a general election could not be deferred beyond 1717. Yet the Septennial Act was passed by which the legal duration of Parliament was extended from three to seven years and the powers of the then existing House of Commons were prolonged for four years beyond the time for which the House was elected.

From these precedents it would appear that Sovereign power is unlimited and cannot, while retaining its sovereign character, be restricted by any particular enactment of its own.

Jenning's Criticism : Legal limitations conceivable :—The legal omni-competence of the British Parliament does not demonstrate the inevitability of the unlimited nature of Sovereignty. Besides Jennings has pointed out that all the instances given by Dicey relate to the *subject-matter* of legislation and not to the *method* of legislation¹. Let us suppose that Parliament passes a law that the House of Lords should not be abolished except after a majority of voters.

(1) Jennings : *The Law and The Constitution* : P. 117

had expressly agreed to it and that no Act repealing that Act should be passed except after a similar referendum. In such a case the new manner and form of legislation has to be followed before the existing law can be changed. Such a rule necessarily involves the limitation of the power of the legislature by a rule of law. This discussion assumes a special importance when it is remembered that Section 4 of the Statute of Westminster, 1933, declares that the British Parliament cannot legislate for a Dominion except with its consent. It is difficult to contend that a rule such as this does not impose a limitation on the legal power of Parliament.

Salmond's View :—Salmond is of opinion that the existence of *de facto* limitations, which even Austin admits, can itself suffice to demonstrate the possibility of legal limitations. He says : " Law is only the image and reflection of the outer world seen and accepted as authentic by the tribunals of the state.....If the courts of justice habitually act upon the principle that certain functions or forms of activity lie outside the scope of legal sovereign power as recognised by the constitution, then that principle is by virtue of its judicial application a true principle of law and sovereign power is limited in law no less than in fact"¹.

Thus if we think of law not as the commands of the sovereign but as the judicially recognised rules administered in courts which as we shall see later, is Salmond's view, we find that sovereign power can be legally limited.

(B) IS THERE NO DIVISION OF SOVEREIGNTY IN THE BRITISH CONSTITUTION ?

Legislative and Executive Sovereign :—In the British constitution, according to its strict theory, the legislative authority alone resides in Parliament, while the executive sovereignty resides in the Crown. In law the executive power of the Crown is sovereign, being absolute and uncontrolled in its own sphere. Austin does not admit this. He says : "The powers of the King detached from the body (Parliament) are not sovereign powers ; but ■■■ simply or purely subordinate : or if the King or any part of its members considered as detached from that body, be invested with political powers, that member as so detached is merely ■ minister of the body, or those powers are merely emanations of its sovereignty"².

(1) Salmond : *Jurisprudence*. P. 684.

(2) Austin : *Jurisprudence* : Vol. I. P. 250.

Salmond combats this view of Austin and observes ■ follows :
 “No law passed by the two Houses of Parliament is operative *unless the Crown consents to it*. How then can the legislature control the executive? A power over ■ person which cannot be exercised without that person's consent is no power over him at all. A person is subordinate to a body of which he is a member only if that body has power to act notwithstanding his dissent.”¹ In legal theory, therefore, the executive under the British constitution cannot be regarded as subordinate to the legislature and so Salmond concludes that the British constitution recognises a sovereign executive no less than a sovereign legislature.

Judicial Sovereign before 1911 :—Salmond further points out that till 1911 a Supreme Judicature was also recognised by the British constitution. The House of Lords in its judicial capacity as a final court of appeal was sovereign, for without its consent its judicial powers could not be impaired or controlled. The House of Lords thus held in severalty the supreme judicial power, while sharing the supreme legislative power with the Crown and the House of Commons. The Parliament Act of 1911 has made it possible for a Bill passed by the House of Commons to become law even without the concurrence of the House of Lords. The power of the latter over general legislation was curtailed by the Act practically to ■ suspensive veto of two years.² The House of Lords has thus been reduced to ■ position of subordination and cannot be regarded since the Parliament Act of 1911 as a sovereign organ. Till 1911, however, as Salmond rightly points out, a sovereign or supreme Judicature was part of the British constitution.

(4) SOVEREIGNTY IN FEDERAL CONSTITUTION

(Eg. UNITED STATES)

Is federal legislature Sovereign :—Let us turn now to federal states. The essence of ■ federal constitution is the distribution of power between the federation and the constituent states with a statutory restriction of the ambit of activity of each to the sphere allotted to it by the constitution. Neither the federal authority nor the constituent states can have the unrestricted power of repealing or altering the constitutional code. For this reason Dicey classed the federal as well ■ the state legislatures as non-sovereign law-making bodies like corporations and town-councils.

(1) Salmond : Jurisprudence, P.491.

(2) This has been reduced to one year and ■ month by the Parliament Act of 1949.

Is Constitution Amending Body Sovereign ?—According to the Austinian theory, sovereignty in a federal state is to be sought in the ultimate power which can alter the constitution. In the United States which has a typical federal constitution, Article V of the Constitution makes provision for constitutional amendment. Such an amendment is to be proposed by a two-thirds majority of the Congress and ratified either by the legislatures of three-fourths of the states or by conventions in three-fourths of the states. It may be proposed also by a constitutional convention called on the application of the legislatures of two-thirds of the states and ratified by the legislatures of three-fourths of the states or by conventions in three-fourths of the states. The power to propose one or the other mode of ratification thus prescribed is vested in the Congress.

It is clear that the constitution-amending body is fettered in coming to decisions by very restrictive rules as to majorities. These restrictions are no doubt conceived to ensure that the constitution does not become too readily mutable. But a sovereign thus trammelled would be more or less a contradiction in terms. Moreover, the constitution-amending body comes into operation only on very exceptional occasions. Bryce pertinently asks: "Is there not something unreal and artificial in ascribing sovereignty to a body which is almost always in abeyance?"

Limits to power of Constitution-Amending Body :—Assuming that the Constitution-amending body is the sovereign the question arises whether its powers are legally unlimited. Prof. Sidgwick observes: "It has legal limits of great importance because it (the constitution-amending body) can operate only when the legal rules determining its structure and procedure are satisfied." Further according to the Constitution of the United States, no state can be deprived of its equal suffrage in the Senate, *without its Consent*. Thus even the constitution-amending body has legal limitations upon its power.

Divisibility of Sovereignty :—Austin's theory of indivisible sovereignty also breaks down in the case of federal states. Sovereignty is split up into legislative, executive and judicial sovereignty. This division is taken as axiomatic in a federal constitution. These three branches are independent of one another in federal states and cannot encroach on one another's sphere in any way.

1. Bryce : *Studies in History and jurisprudence*, VOL II. p. 540.

View of Bryce :—Even if sovereignty is restricted to legislative sovereignty, Austin's theory is inapplicable to federal constitutions. In the United States of America the Congress can legislate on central (federal) matters only and the residuary legislative power is given to the state legislatures. Bryce observes: "Each legislature, therefore, (Congress and the state legislature) has only a part of the sum total of supreme legislative power. The sovereignty of each of these authorities will then be to the lawyer's mind, a partial sovereignty. But it will nonetheless be a true Sovereignty sufficient for the purpose of the lawyer.¹" The conclusion of Bryce is that "Legislative sovereignty is *divisible*, that is, different branches of it may be concurrently vested in different persons (or bodies), co-ordinate altogether, or co-ordinate partially only, though acting in different spheres.²"

(5) SOVEREIGNTY IN THE INDIAN CONSTITUTION

Austin's theory of legally unlimited and indivisible sovereignty finds no support in the Indian constitution.

Legislative and Executive sovereignty :—By Art. 53 of the Indian Constitution the executive power of the Indian Union is vested in the President of India. Legislative power resides in Parliament which comprises the President, the Council of States and the House of the People. An amendment of the constitution can take place only when the amending Bill after being duly passed as required by Art. 368 of the Constitution, has received the assent of the President. It is thus clear that the powers of the President as supreme executive cannot be impaired without his consent. In the executive sphere, therefore, the President is supreme and may be regarded as the Executive sovereign. The powers of the Supreme Court may be impaired without its consent and so there is no judicial sovereign in the Indian Constitution.

Division of Legislative Sovereignty in Federal constitutions :—In a federation even legislative sovereignty is divided between the Federal legislature and the state legislatures

The vital core of a federal constitution is the division of legislative powers between the central authority and the component states

1. Bryce : *Studies in History and Jurisprudence* Vol. 2, p. 507.

2. *The Constitution of India*, Art. 79.

of provinces. This division represents the compromise between the forces which make union possible and those which inhibit the formation of a closer union. One of the basic principles of federalism is that the division of powers thus effected should not be allowed to be disturbed by the unilateral action of the Federal or the State authorities. Thus, in the United States, it is not possible for the national government to transfer to itself any of the powers belonging to the States, nor to suspend the working of the State Governments.

Thus in the United States there is a clear division of legislative sovereignty.

Peculiarity of Indian Federalism—The provisions of the Indian Constitution, however, are calculated to establish federal supremacy in the legislative field. For this reason it is regarded not as a genuinely federal constitution but only as a quasi-federal constitution.

Federal supremacy in the legislative field is laid down in various Articles of the Indian Constitution, such as Arts. 249 to 253, 356, 357, etc. The Union Parliament can legislate on a state subject if the council of States declares by a resolution passed by a two-third majority of its members present and voting that it is expedient to do so in the national interest. Such a resolution can be in force for such period not exceeding one year as may be specified therein. It may be renewed for a further period of one year from the date on which it ceases to be in force, by a specific resolution of the Council of States (Art. 249). Secondly, during an emergency period so declared by the President under Art. 352, the Union Parliament can legislate on any State subject for the whole or part of the territory of India (Art. 250). Thirdly, in case of the failure of the constitutional machinery in a State the President may by proclamation authorise the Union Parliament to legislate for that State in respect of State subjects (Art. 356) (1) (b). Fourthly, Parliament can legislate on State subjects for two or more States at the request of their legislatures by resolution (Art. 252). Fifthly, Parliament has power to make any law for implementing any treaty or international agreement even if such legislation may encroach upon purely State subjects (Art. 253).

Locus of legislative sovereignty :—The Indian constitution proceeds upon a division of legislative powers between the centre and the component units. This division of power is justiciable and is guarded by the Supreme Court. If the matter rests there it would be

easy to conclude that there is a division of legislative sovereignty in a typical federation. The framers of the Indian Constitution wanted to ensure that in spite of federalism the national interest ought to be paramount. They have thus provided that the Federal legislature (Parliament) can make laws on subjects in the state legislative list upon its own determination that such assumption of state power is "necessary or expedient in the national interest." All that is required for this purpose is a simple resolution of two thirds of the members present and voting in the Council of States, which is itself the upper chamber of Parliament. It is therefore, to be concluded that there is no division of legislative sovereignty in the Indian constitution. Parliament is the repository of the legislative sovereignty.

Sovereignty is limited by the constitution :—The legislative sovereignty of Parliament, however, is not unlimited. This is because Parliament does not have unqualified Constituent power. For making certain changes in the Constitution, e. g. for altering the legislative lists, the Constitutional amendments have to be ratified by the legislatures of not less than one-half of the States specified in Parts A and B of the First Schedule to the Constitution. This element of rigidity in the Constitution shows that the Indian Parliament can have no claim to omniscience. Parliament is thus sovereign in its sphere, but this sphere is not infinite.

Can sovereignty be located in the Constitution-amending body :—It may be suggested that sovereignty may be located in the Constitution-amending body in which case it would be unlimited and indivisible as required by Austin's theory. Indeed Austin sought to locate sovereignty in the United States in this way. Such an attempt, however, has to be abandoned in the Indian Constitution,¹ for that Constitution does not prescribe only one procedure for Constitutional amendment. Some amendments can be made by Parliament itself without the concurrence of the states. Certain amendments mentioned in the proviso to Art. 368 of the Constitution require in addition ratification by the legislatures of one-half of the states. Thus as there is not one Constitution-amending body for all purposes, it is not possible to point to it as the repository of sovereign power. Further, the Constitution-amending body functions but rarely and it would be thoroughly artificial to ascribe sovereignty to it.

(1) Constitution of India Art. 368.

Conclusion :—In the Constitution of Bharat, therefore, there is no legally unlimited and indivisible sovereignty as understood by Austin. Sovereignty in the sense of “a supreme power, absolute and uncontrolled within its own sphere” can, however, be traced in that Constitution. Such sovereignty so far as the Executive sphere is concerned is in the President of Bharat. So far as the legislative sphere is concerned, such sovereignty resides in the Parliament of the Union of Bharat.

CONCLUDING REMARKS

Sovereign Power in Rigid Constitutions :—Sir Henry Maine has remarked that “the sovereign power may be found in every independent political society as certainly as the centre of gravity in a mass of matter”. But as Prof. Vinogradoff has observed : “In our days of complicated political organisation it is not easy to distribute the members of the commonwealth into two classes of rulers and ruled and to ascertain who wields supreme power in the state and who is in the habit of obeying commands.”¹

The difficulty in discovering the legal sovereign is encountered in rigid constitutions generally, for in such constitutions the legislature is legislative without being constituent. Thus in Belgium to effect a change in the constitution, the amendment decided upon by the legislative Assembly has to be ratified by a new Assembly re-chosen by the electorate for the purpose. In such a case the legislature can hardly be described as sovereign in the Austinian sense. We are forced to seek the sovereign in the electorate, but we have already seen that the electorate can in no sense be the legal sovereign for it cannot legislate and has no legal means of legislating by itself and is, moreover, not a determinate body.

Bryce rightly observes : “In nearly all free countries except the United Kingdom legislatures are now restrained by rigid constitutions so that there is no sovereign answering the Austinian definition.”²

Laski's View :—Discussing the location of sovereignty in the United States, Prof. Laski observes thus : “The Congress is a limited body the powers of which are carefully defined; the separate

1. *Vinogradoff : Historical Jurisprudence*, 221

2. *Bryce : Studies in History and Jurisprudence* Vol. II. p. 537.

states are similarly cabined within the four corners of the constitution and even the amendment of the constitution is limited by the exception that no state shall, without its own consent, be deprived of its equal suffrage in the Senate. In the theoretic sense, therefore the United States has no sovereign organ...A peculiar historical experience has therefore devised the means of building a state from which the conception of sovereignty is absent. We may, of course, prize highly the theory of sovereignty as to urge that a society which does not possess it is not a state at all. But a political philosophy which rejects the title of the United States to statehood is unlikely to apply to a world of realities".¹

Jennings' view of sovereignty :—If sovereignty is understood in the Austinian sense a supreme power, the discovery of sovereignty in a federal state or in a rigid constitution is practically an impossible adventure. The true view, however, is expressed by Jennings when he observes that "Sovereignty is only a legal concept, a form of expression which lawyers use to express the relations between the legislature and the courts"². It means that the courts recognise as law the rules made by the legislature. Thus understood, we may regard an authority as *Sovereign within its powers*. Such an expression would no doubt be meaningless if 'Sovereignty' is understood in the Austinian sense referring to unlimited Supremacy. But if 'Sovereignty' is only a legal phrase for legal authority to pass any sort of law, it may with propriety be said that a legislature is sovereign in respect of certain subjects for it may pass any sort of laws on those subjects though not on any other subjects. This view steers clear of the difficulty felt by Dicey which has compelled him to classify in the same category as non-sovereign law-making bodies such wholly disparate authorities as the Parliament of Canada, the Congress of the United States, the London County Council and an English Railway Company.

Conclusion :—Austin's theory of sovereignty has no doubt suggested, as Dicey points out, by the contemplation of the unique position of the English Parliament as an omniscient legislature. A closer examination, however, reveals, as we have seen, that the Austinian contention is only an unwarranted generalisation from a dubious interpretation of the British Constitution.

1. *Laski : Grammar of Politics P. 49.*

2. *Jennings : The Law and the Constitution, p. 140*

PART THREE
POSITIVE LAW

“The end of Law is freedom.”
Hegel, Philosophy of Right and Law.

CHAPTER VIII

POSITIVE LAW

Law in a generic sense :—Blackstone defines law in its most general and comprehensive sense as “ a rule of action.” In this sense the term ‘law’ is applied indiscriminately to all kinds of action, whether animate or inanimate, rational or irrational. Thus we speak of the laws of motion or mechanics as well as the laws of nature and of nations. The jurist, however, is concerned only with one particular category of such rules. He has, therefore, to narrow and deepen the generic conception of law as a rule of action and arrive at a definition of law in its strict sense to serve the purpose of his science.

The jurist has to deal only with canons or norms to which human conduct is required to conform. The rules of action that govern inanimate and irrational creation are outside his province.

Laws, Divine and Human :—The laws or rules of human conduct are divisible into two classes : laws set by God and laws set by man. Divine laws are regarded as revelation of the will of a supernatural power. These no doubt are the proper subject-matter of *Theology* and should be withdrawn from the cogniscence of jurisprudence.

Human laws are themselves divisible into two classes : Rules enforced by indeterminate authority and rules enforced by determinate authority. Both classes represent rules intended for the guidance of human beings. In the case of the former, however, there is no definite authority which can be appealed to, if there is an infraction of the rules.

Moral Law :—Moral laws come under the category of rules enforced by indeterminate authority. Every society recognises certain ethical rules of conduct obedience to which is insisted upon by a deepseated public sentiment. These moral laws are referred to by John Austin as *Rules of Positive morality*, the term *Positive* indicating that they are made by human authority and so distinguishing them

from Divine laws. Laws of fashions, of social demeanour, of professional etiquette, or of honour between gentlemen also fall under this category. These and such like are received in society or in certain circles of society and their contravention is visited by ridicule, obliquy, ostracism and the like.

Positive Law :—Certain rules of conduct are enforced by determinate authority. In every organised community this power belongs to the state. Laws thus enforced by the state are laws strictly so called. "A law," says Holland, "in the sense in which that term is employed in Jurisprudence, is enforced by a sovereign political authority." Austin calls it Positive law.

Positive law synonymous with Civil Law :—Law then for the purpose of jurisprudence is law that is enforced by the state and has at the back of it the organised power of a politically organised community. This is referred to by Austin as Positive Law. Sir John Salmond prefers the term 'Civil Law', law of *civitas* or state for he considers that it represents the idea of 'law of the land' better than the term 'Positive Law' *Jus Positivum* or positive law is used in contrast with *Jus Naturale* for distinguishing law having its source in nature and denoting law made by human authority. In that sense 'Positive Law' may include international law and so, to obviate such confusion, Salmond uses the term 'Civil Law' to denote the law enforced by the state. The term 'Civil law', however, is sometimes used to refer to the Roman law. It is, moreover, used in contradiction with criminal law. The term 'Positive law' is, therefore, retained in this work to signify national law. However the terms 'Civil law', 'Positive law', National law and 'Municipal law' are generally used as synonymous terms and they are to be so understood unless the context indicates that any distinction is intended.

Theory of Positive Law :—The nature of Positive Law will be examined in the next two Chapters.

CHAPTER IX

THE AUSTINIAN THEORY OF LAW

(Imperative or purely imperative theory of Law)

(1) STATEMENT OF THE THEORY

Sovereign is the source of law:—Austin says: “Every positive law or every law simply and strictly so called, is set by a sovereign individual or a sovereign body of individuals to a person or persons in a state of subjection to its author.” Thus, according to Austin, law is the product of the sovereign. If there is no sovereign there can be no law. Also, the existence of law is an unmistakable indication of the existence of a sovereign.

Law is ■ Command:—“Positive law,” says Austin, “consists of commands set as general rules of conduct by ■ sovereign to a member or members of the independent political society wherein the author of the law is supreme.” According to Austin, therefore, law is made up of general commands issued by the sovereign to the subjects. Nothing that is not a command is law; and nothing commanded by any one but the supreme authority is law.

Austin regards a legal rule as made up of two parts: first, a general command stating the legal requirement; second, a sanction providing that if the command is not obeyed, force will be employed against the recalcitrant person.

Law: a general and not a particular command:—To be a law the command of the sovereign should be ■ general command. Sometimes a command requires only a specified act or forbearance. In that case, it is not a law but only a *particular command*. Blackstone takes the view that a law obliges generally members of a given *class* while ■ particular command obliges persons individually. Austin says that this view is not correct. He holds that ■ law is a general command which obliges a person or a class of persons *to acts or forbearances of a class*, while a particular command obliges *to acts or forbearances determined specifically*. A law then, according to Austin, is the expression of a wish by the sovereign that the subject

shall do or forbear from doing acts of a class as distinguished from a simple or isolated act. A law, that is to say, is a general command.

Command implies Sanction:—Law being a command there are sanctions for its enforcement. A sanction is some evil which will be inflicted on the subject in case of neglect to obey the command. According to Austin “sanction” is an essential ingredient of law.

Summary:—To sum up, Austin’s theory may be stated thus. Law has its source in sovereign authority and without a sovereign there can be no law. Every law is a command of the sovereign and is accompanied by a sanction. The command to be a law should oblige to a course of conduct and not merely to a specific or limited number of acts or forbearances, though it need not be expressed to more than one person. These are the three chief characteristics of positive law.

We shall subject this theory to a close and searching criticism.

(2) CRITICISM OF THE IMPERATIVE THEORY

Sovereign may not necessarily be the source of Law:—Austin’s theory has come in for much criticism at the hands of the historical school of jurists. Sir Henry Maine points out that the theory is inadequate for it tallies only with the facts of mature jurisprudence. Law is not invariably linked to sovereignty in all ages and in all climes. The interdependence of law and sovereignty is not true with regard to many Asiatic communities under native rulers. “At first” observes Maine, “there can be no more perfect embodiment than Runjeet Singh of sovereignty, as conceived by Austin...But he never made a law. The rules which regulated the life of his subjects were derived from their immemorial usages, and these rules were administered by domestic tribunals, in families or village communities”¹. There can be no doubt that if we leave the fully developed modern state and consider earlier times and earlier social organisations, Austin’s proposition—“No law, no sovereign” immediately falls to the ground.

Law exists in the absence of Sovereign:—The converse proposition that if there is no sovereign there can be no law, is also unsound. In primitive societies there may be no sovereign law-making power,

1. *Maine : Early History of Institutions* p. 382.

but still there is law in the form of custom. Early law is not the command of the state at all, but a customary rule enforced by the public opinion of the community. Law as the product of the supreme power governing a body politic is the form which early law has come to assume at a later stage of social evolution. Thus law is prior to and independent of the existence of political authority. Austin's theory of law is historically inaccurate in so far as it postulates the interdependence of law and sovereignty.

Criticism of Bryce:—Bryce, another eminent historical jurist, also observes: "The once popular definition of law as a command of the state is an instance of the danger of forgetting the past, for the fact that it would have been palpably untrue in certain stages of political development shows it does not rest on a sufficiently broad foundation"¹. He thus fully endorses the above criticism of Sir Henry Maine.

(3) SALMOND'S REPLY TO MAINE'S CRITICISM

Early laws: 'Positive morality' and not 'civil law':—Sir John Salmond has attempted a reply to the *historical argument* against the validity of Austin's definition of law. Austin's theory, he says, is a theory of law as it exists in a mature state. Austin is not concerned with early society and what passed for law at that time. The rules to which Maine refers are not properly laws. They are the defective and deformed predecessors of the more perfected type that constitutes the positive law of the more civilised states. One may historically trace the new modern type to the older as its source as one can biologically trace the descent of man from the anthropoid ape: but the two logically belong to essentially separate species with perfectly well-cut differentias to distinguish them. To ignore this distinction would be to confound *logical* with *historical* unity.

In the words of Salmond: "If there are any rules 'prior to and independent of society, they may greatly resemble law, they may be the primeval substitutes for law; they may be the historical source from which law is developed; but they are not themselves law'"².

Difference between the analytical and the historical schools:—Salmond's remarks clearly reveal the point at which the analytical

1. Bryce: *Studies in History and Jurisprudence*. Vol. I. P. 182.

2. Salmond: *Jurisprudence*, p. 51.

and historical schools part company. To the analytical jurist law is an arbitrary creation of the state, and so it is to the *imprimatur* of the state that he looks for its identification. To the historical jurist, on the other hand, law represents the unfolding of the genius of a people. Hugo and Savigny considered that the formation of law is analogous to the formation of the languages or the well-known games of a people. A rule of law is not imposed *ab extra*, but arises little by little by the successive resolution of doubtful questions in particular cases. *Ubi civitas ibi lex* (=where there is a State, there is law) is the maxim of the analytical school; *Ubi societas ibi lex* (=where there is society, there is law) is the motto of the historical school.

(3) SIR JOHN SALMOND'S CRITICISM OF THE IMPERATIVE THEORY.

Ethical Purpose of Law Ignored :—Salmond agrees with Austin's conclusion that law and the state are indissolubly linked together. Though to this extent the Austinian theory contains an element of truth, Salmond considers that the theory is one-sided and inadequate for, it does not contain the whole truth. The imperative definition of law eliminates from the implications of the term, 'law', all elements save that of force. By this illegitimate simplification, Austin has missed the ethical element in law, the idea of right or justice which inheres in any complete conception of law. It is not by accident that the expressions law and justice are regarded as synonymous and courts of law are described in popular parlance as courts of justice. In essence law is the declaration of a principle of justice. The imperative theory does not take note of the purpose of law and cannot, therefore, be accepted as providing an adequate definition of law.

Imperative aspect unduly stressed :—Salmond further points out that the Austinian theory not only misses the ethical aspect of law, but over-emphasises its imperative aspect. Salmond no doubt concedes that state enforcement is an essential ingredient in law, but he says this is true only in the sense that law requires the coercive administration of justice by the state. It is not true in the sense that Austin would have us take it, namely, that every legal principle is a command enforced by a sanction. Salmond points out that while some principles of law are imperative principles, others are not.

All laws are not commands. Much modern law is of a purely permissive character and confers privileges. The law, for example, permits a man to make ■ will : it does not command him to do so. Salmond points out that rules relating to judicial procedure and interpretation of statutes also lay down no imperative principles. In fact, Austin himself found three exceptional cases of civil law which do not square with his imperative definition. He says : "Declaratory laws, and laws repealing laws ought in strictness to be classed with laws metaphorical and figurative and laws of imperfect obligation with positive morality. But those classes are so closely connected with positive law, that it is advisable to treat them therewith."¹

Thus declaratory laws, permissive and enabling statutes, and the rules relating to civil procedure and interpretation of statutes cannot be accommodated within Austin's imperative definition of law. Salmond, therefore, concludes : "All legal principles are not commands of the state; and those which are such commands are at the same time and in their essential nature, something more, of which the imperative theory takes no account."²

Austin defined law in the 'concrete' sense and not in the abstract:—Salmond adverts to another capital defect of the Austinian theory. That theory, he says, attempts to answer the question 'what is a law?' whereas the true inquiry should be 'What is law?' Law in the abstract sense—what the Romans called *jus* as distinguished from *lex* and the Germans call *Recht* as distinguished from *Gesetz* is more comprehensive in its signification than law in the concrete sense as meaning 'a law,' *lex* or *gesetz*. Indeed, as Salmond remarks, "The central idea of juridical theory is not *lex* but *jus*, not *gesetz* but *Recht*".³ The Austinian theory by trying to define 'a law' is led to the wrong conclusion that statute law is typical of all law and the form to which all law reduces itself in root analysis. The error in the conclusion is traceable to the wrong method of approach adopted by Austin. Hence it is sometimes said that the chief defect of the Austinian definition lies in the *method employed by Austin to arrive at the definition*.

(1) *Austin : Jurisprudence*, p. 214.

(2) *Salmond Jurisprudence*, p. 54.

(3) *Salmond: Jurisprudence*, p. 38.

Difference between 'the law' and 'a law' :—Further, Austin says that positive law is the "aggregate of the rules established by political superiors." He thus endorsed the view of Bentham that "Law or the law.....can mean neither more nor less than the sum total of ■ number of individual laws taken together." Salmond shows that this view is not tenable. According to him "All law is not produced by laws and all laws do not produce law." Law, *sensu abstracto*, represents the whole body of rules recognised and applied by the courts. 'A Law,' or law *sensu concreto*, usually arises from the exercise of the state's legislative authority and is one of the sources of law in the abstract sense. Judicial precedent and custom are also sources of law and they respectively produce case-law and customary law. These latter are also applied by the courts though they have not been enacted by any law. Hence "all law is not produced by laws." Further, Salmond points out that "although laws commonly produce law, this is not invariably the case." Every Act of Parliament is called a law, but not all Acts of Parliament formulate rules of law. Thus before the system of judicial divorce was introduced in England by the *Matrimonial Causes Act* of 1857, a divorce could be obtained only by means of a private Act of Parliament. Such a law enacting that A and B shall cease to be husband and wife certainly formulates no legal principle, i.e., creates no law. Salmond is thus justified in saying: "All law is not produced by laws, and laws do not produce law,"

(4) OTHER CRITICISMS.

Frederic Harrison's Criticism:—Frederic Harrison also disapproves Austin's undue insistence on the imperative character of law. He points out that statutes conferring franchises, enabling and declaratory statutes, as well as permissive legislation can hardly fit in with Austin's definition of law as a *command* of the state. He says further: "It seems a serious defect in Austin's account of law that it fails to distinguish laws from purely executive rules, standing orders and the like"¹. All commands of the sovereign are not laws. Disciplinary laws for the guidance of government departments are general commands but they do not give rise on infringement to any remedies in a court of law and have, therefore, to be distinguished from laws strictly so called.

1. Harrison: *Jurisprudence and the Conflict of laws*, p1 47.

Vinogradoff's Criticism:—Sir Paul Vinogradoff has pointed out that if coercion be the essence of law, then law would be binding only on subjects and subordinates while the highest persons in the state would be above and outside the law. This, however, conflicts with the existence of constitutional law. Austin no doubt does not concede the claim of constitutional law to be regarded as law strictly so called. Likewise, Austin's definition denies the title of law to international law since it has no compelling force for its enforcement. Vinogradoff's conclusion is: "Law has to be considered not merely from the point of view of its enforcement; it depends ultimately on recognition."

CHAPTER X

SALMOND'S DEFINITION OF LAW

(1) DEFINITION OF THE NEO-AUSTINIAN SCHOOL

Laws are principles enforced by Courts:—“Law may be defined,” says Salmond, “as the body of principles recognised and applied by the state in the administration of justice”¹. This definition is substantially the same as that of Prof. Gray of America who says:

“The law of the state or of any organised body of men is composed of the rules which the courts—that is, the judicial organs of that body—lay down for the determination of legal rights and duties”².

Laws may be made by legislation. They may also arise out of popular practice. Their legal character becomes patent, however, only when they are recognised and applied by a court in the administration of justice. Courts may misconstrue a statute or reject a custom. It is only the ruling of the court that has binding force as law. Salmond considers that if the highest court of a state were wilfully to misconstrue an Act of the legislature, the interpretation so placed on that Act would *ipso facto* be the law since *ex-hypothesi* there is no higher judicial tribunal with jurisdiction and authority to decide the contrary. Hence he concludes that the true test of law is enforceability in the courts of law.

Merits of Salmond's definition :—Salmond has defined law in the abstract sense. The *central* idea of juridical theory is not *a law* or law in the concrete sense of enacted law, but *the law* or law *sensu abstractu* which embraces every rule of law from whatever source it may arise. Salmond's definition brings out also the ethical purpose of law. Law is the instrument of justice. This idea is prominently brought out in Salmond's definition of law. In spite of these obvious merits, Salmond's theory had to encounter adverse criticism which is considered below.

(1) Salmond: *Jurisprudence*. P. 39.

(2) Gray: *The Nature and the Sources of law*: p. 82.

(2) VINOGRADOFF'S CRITICISM

Circular Definition :—Vinogradoff is not satisfied with Salmond's definition of law. He says : "The direct purpose for which judges act is, after all, the application of law. A definition of law starting from their action would therefore be somewhat like the definition of a motor-car as a vehicle driven by a chauffeur." He pertinently asks "what should we think of a definition of medicine as a drug prescribed by a doctor?"¹

The administration of justice by a court means and involves the enforcement of the law. When the administration of justice has to be defined as the application of law, no useful purpose would be served by defining law as what is applied in the administration of justice. To seek for a definition of law in the function of the court is to beg the very question which we have set out to answer. Salmond's definition thus suffers from the vice of running in a circle.

Inversion of Logical order of ideas :—Vinogradoff observes that the definition of law by reference to the administration of justice inverts the logical order of ideas, for the formulation of law is a necessary precedent to the administration of justice. The law has to be formulated before it can be applied by a court of justice. Salmond's definition is defective for it assumes that law is logically subsequent to the administration of justice, or in other words, that a rule is law *because* courts of justice would apply and enforce it in deciding cases, rather than that courts of justice would apply and enforce it *because* it is law. The vice of hypallage thus vitiates Salmond's definition of law.

Salmond's Answer to the Criticism :—Sir John Salmond has himself supplied the answer to the above objection which he considers to be based on a misapprehension of the essential nature of the administration of justice. The administration of justice is primarily the maintenance of right and justice. For this purpose law is not indispensably requisite. Justice may be dispensed by judges who are allowed an unfettered discretion to decide according to equity, good conscience and natural justice. Such was the case in early times when a court of justice was not also a court of law. In the administra-

(1) *Vinogradoff Historical jurisprudence*, p. 117.

tion of justice the corpus of the law is built up and legal principles are collected from various sources—custom, statute, precedent—and in proportion as the body of law grows in dimensions, the individual discretion or private judgement of the judge diminishes in its scope. A legal system consisting of inflexible and pre-established principles is thus not a condition precedent, but a product of the administration of justice. Law consists of these authoritative principles. It is the instrument for the attainment of the end of justice in the judicial administration. It is, therefore, in the fitness of things that the instrument should be defined with reference to its end.

(3) REALIST SCHOOL OF AMERICA

Logical Sequel to Salmond's definition :—The definition of law adopted by Salmond and Gray destroys the very nature of the thing which it seeks to define. If a statute is not law because it may be misinterpreted, neither is a judicial decision because it may be overruled. Mr. Justice Cordozo points out the result of pushing Salmond's view to its logical extreme when he remarks : "In that view, even past decisions are not law. The courts may overrule them.....Law never is, but is always *about to be*. It is realized only when embodied in a judgement, and in being realized, expires. There are no such things as rules and principles there are only isolated dooms".

The realist school of American jurists is prepared to push Gray's definition to its logical conclusion. Mr. Justice Holmes says : "The prophecies of what the courts will do in fact and nothing more pretentious are what I mean by law". Law is then a matter of prediction. It does not consist even of rules already recognised and acted on, as Salmond would define it, it consists of the rules which the courts will probably recognise and act upon.³

(4) CONCLUDING REMARKS ON THE THEORIES OF AUSTIN AND SALMOND.

Austin emphasises the legislative Source of law :—Austin has defined law with reference to its formal source, namely, the state. In this he follows Bentham who defined law as "the will or command

(1) *Cordozo : The Nature of the Judicial Process* : P., 126.

(2) *Holmes : Collected Papers* : P. 172.

(3) *For a criticism of this theory. see Mr. A. L. Goodhart's Essay : 'Some American Interpretation of Law' in 'Modern Theories of Law' : P. 1.*

of the legislator". Austin considers law as an exclusively state product. He ignores customary law which arises from popular practice and recognition. Much of the Hindu law which governs the lives of millions of Hindus was never formally promulgated by any sovereign authority. It is mostly customary law. Nelson, a loyal Austinian, observes in his *'Hindu law'* "Looking at 'law' from Austin's point of view, I have always been unable to bring myself to believe that law has at any time been known to the so-called Hindu population of India"¹. He concludes that Hindu law is merely "a figment of the imagination of sankritists without law and lawyers without sanskrit". This drastic conclusion unmistakably shows that Austin's conception of law is too narrow to be accepted as a complete or adequate definition of law.

If law is a state product, it follows that there can be no law acting outside of a state's boundaries. In other words, international law would be inconceivable.

In effect, Austin regards legislation as the sole source of law. Even if this is technically correct, his definition of law as a command enforced by a sanction, describes only the dry and repellant aspect of law. Austin has not attached due importance to the other essential aspects of law, its propriety and beneficence and the value of its authority which, more than the fear of sanction, induces people to observe the law. He misses the idea of uniformity and order implicit in the conception of law. Law is a living organic entity which makes for the highest good and expresses, for the time being, the highest ideals of the organised society. Austin leaves out of account also the courts of justice that not only administer the law but practically develop it.

When all is said, however, it should be conceded that much credit is due to Austin for making jurists recognise the fact that law is mostly the product of the state and depends for its existence on the physical force of the state exercised through the agency of its judicial tribunals.

Salmond's definition gives prominence to judicial action:— Salmond, like Austin, has defined law with reference, to its source of origin. He gives prominence, however, to the law courts, instead of to the sovereign or legislature. Austin's definition has two principal

(1) Nelson : *Hindu Law*, P. 3.

defects. It does not associate law with its essential element of right and justice. It fails to include rules which, though they are undoubtedly laws, are not reducible to the form of commands. Salmond's definition avoids these defects. Further, it satisfies the requirements of logic, for it is convertible. All laws are recognised by the courts and no rules are recognised and administered by the courts which are not rules of law.

In view of the great prominence given to judicial action in Salmond's definition, one has to conclude that "The law of a great nation means the opinions of half-a-dozen old gentlemen, for if those half-a-dozen old gentlemen from the highest tribunal of a country then no rule or principle which they refuse to follow is law in that country."¹

1. Gray: *The Nature and the Sources of the law*, p. 82.

CHAPTER XI

CLASSIFICATION OF LAW

The following classification of law are noteworthy :

(1) Public law and private law :—Public law is that part of the law which deals with the constitution and working of the State and the functions of its various administrative departments. It thus comprises two divisions : (i) Constitutional Law and (ii) Administrative law.

Private law is that portion of the law which governs the subjects in their dealings with one another. Its subdivisions are : (i) The law of property; (ii) The law of obligations arising from tort of otherwise and (iii) The law of status. Criminal law is on the border line between private law and public law.

(2) General law and Special law :—The general law of a country is its territorial law, the law which applies to all persons, things, acts and events within its territory. The Indian Penal Code and the Contract Act, for instance, have general operation throughout India and form part of the general law. Special law is also enforced by the courts of the Country, but it is not the ordinary law of the land. It consists of various bodies of legal rules which are somewhat exceptional in character and may, therefore, be regarded as standing quite distinct and apart from the general law.

(3) Personal laws and Territorial laws:—Laws applicable only to a particular section of the people are personal laws. Those which operate in a particular territory and are applicable to persons generally are territorial laws.

(4) Substantive law and procedural law:—Substantive law relates to the subject-matter of litigation while procedural law appertains to the process of litigation and is meant for the regulation of judicial proceedings.

The nature of criminal law and of the several subdivisions of substantive private law will be clarified in the analysis of the concepts.

with which they deal, e. g. crimes, property, torts, contract, status etc. and will be dealt with in Part V. Procedural law will be considered while dealing with justice and the judicial process. The purpose of Criminal law will be explained in Part III section III and its nature more fully considered in Part IV while discussing the nature of crimes. The other subdivisions of the law will be dealt with in the succeeding chapters of this section.

CHAPTER XII

CONSTITUTIONAL LAW

(1) NATURE OF CONSTITUTIONAL LAW

Definition:—Hibbert defines Constitutional law as “the body of rules governing the relation between the sovereign and his subjects and the different parts of the sovereign body.”¹ According to Dicey, “Constitutional Law includes all rules which directly or indirectly affect the distribution or exercise of the sovereign power of the state. Hence it includes (among other things) all rules which define the members of the sovereign power, all rules which regulate the relation of such members to each other, or which determine the mode in which the sovereign power or the members thereof, exercise their authority.”²

From these definitions it is clear that constitutional law deals with the fundamental and far-reaching principles governing the structure of the state.

Austin's View : ‘Not law strictly so called’ :—According to Austin positive law is a command of the sovereign and the sovereign himself is not bound by law, for one cannot be bound by one's own commands. Constitutional law, however, purports to control the sovereign. Austin, therefore, concludes that constitutional law is not positive law or law in the strict sense, but is merely positive morality. “Against ■ sovereign body in its collegiate and sovereign capacity”, observes Austin, “constitutional law is positive morality merely, or is enforced merely by moral sanctions.” According to Austin, constitutional law derives its force only from public opinion regarding its expediency and morality. It therefore belongs only to the class of moral rules and cannot be regarded as a part of positive law.

1. Hibbert : *Jurisprudence*, P. 199.

- Dicey : *Law of the Constitution*, P. 76.

Willoughby's Criticism:—Willoughby points out that “constitutional provisions do not purport to bind the *State* but the *Government*. This vital distinction Austin did not grasp.” The government is only a limb of the state and so a rule defining the manner of the exercise of governmental power need not necessarily impinge on the Austinian theory of legally unlimited sovereignty. This would dispose of Austin's difficulty in recognising constitutional law as law properly so called.

But the assumption of Willoughby that constitutional law does not purport to bind the sovereign as such does not seem to be well-founded. In rigid constitutions, for instance, the sovereign is undoubtedly cramped by constitutional limitations.

Salmond's view:—The very fact that Austin's definition of law excludes constitutional law from its ambit, points to the basic unsoundness of that definition. In Salmond's view law is the body of principles applied by the courts in the administration of justice. If certain principles relating to the structure and mode of operation of the sovereign power are enforced by the courts, they must be treated as true principles of law by virtue of such enforcement. Constitutional law is thus law in the strict sense according to Salmond's definition of law.

(2) “THE CONSTITUTION IS BOTH A MATTER OF FACT AND A MATTER OF LAW—” Salmond

Question raised by Dicey:—Dicey asks “Is it possible that the so called ‘Constitutional Law’ is in reality ■ cross between history and custom which does not properly deserve the name of law at all?”¹ Salmond also raises the question whether constitutional law is in reality law at all seeing that the constitution of a state is necessarily antecedent to law and law itself arises only after the state is established. There can be no law unless there already exists ■ constitutional structure called the state. Apparently, therefore, the constitution is only a matter of fact with which the law has no concern. How then can constitutional law be regarded as law *strictu sensu*.

Salmond's Answer:—Salmond meets the objection thus raised by pointing out that, while it is true that the constitution as matter of fact is logically anterior to the constitution as a matter of law,

) Dicey : *Law of the Constitution*, p. 21.

"constitutional law follows hard upon the heels of constitutional fact." To start with, a constitution has only an extra-legal origin and sometimes, as in the case of the United States of America, which was formed by rebellion against the mother country, even an illegal origin. In time, however, the objective reality of the *de facto* organization of the state obtains recognition from the courts of law. A theory will then be evolved of the constitution as it appears when it is looked at through the eye of the law. This is constitutional law.

Salmond's View illustrated:—Constitutional principles, therefore, are true laws *when they are received and enforced in courts of justice*. Let us take for instance the fundamental principle of the British constitution that 'The King can do no wrong.' This constitutional maxim has political, as well as legal implications. In its political aspect the maxim means that the King can do no political or executive act except under responsible advice of ministers and through responsible agents. The king reigns but does not govern. This principle has, indeed, protected and preserved the Crown as no other single contrivance of the delicate equipoise exhibited in the complex mechanism of the English Constitution. When this principle is recognised by the courts it assumes a legal aspect. It then means that the king is perfectly irresponsible for his actions and enjoys immunity from being sued in civil courts or prosecuted in criminal proceedings. In this sense it is acted upon by courts. So long as it is adhered to by the courts, this principle is a true constitutional law.

Besides unwritten maxims like the one we have just now examined, there may be Charters and Statutes at the basis of a constitution. These must be recognised by courts and are as such true constitutional laws. The following constitutional landmarks will occur to every student of English constitutional history: the Magna Charta (1215); The Petition of Right (1628); The Bill of Rights (1689); The Act of Settlement (1700); The Act of Union (1707); The Reform Acts of 1832, 1867, 1884 and 1885; The Parliament Act (1911), The Irish Free State Act (1922), and the Statute of Westminster, 1931. These statutes no doubt cover only a small portion of English constitutional doctrine, but that they are true laws can hardly be disputed though they purport to affect the constitution.

Constitutional Conventions:—The law of the constitution, therefore, consists of those principles, whether written or unwritten, which are enforced by the Courts of justice. There are, however,

several constitutional principles which are observed in actual practice but are not enforced by the courts. These are called by Dicey the conventions of the constitution.

Illustration of conventions:—The nature of the conventions of the English Constitution may now be considered. Some of these are, as Dicey says, “Rules for determining the mode in which the discretionary powers of the Crown ought to be exercised. The powers of the crown are very formidable on paper, but in practice they are nullified by conventions. For instance, legally the Crown has a power of veto on legislation. No Bill passed by the two Houses of Parliament is law unless the Crown assents to it. But the legal power of veto is subject to the convention that the King must assent to a Bill passed by Parliament. In legal theory the King can choose his ministers at his own pleasure. The constitutional convention, however, is that the King is bound to ask the leader of the party having a majority in the House of Commons to form the ministry. In fact the royal prerogative has passed almost completely to the Cabinet and this has been effected simply by constitutional conventions and nothing else.

A second class of conventions regulates the relations between, and the exercise of the discretionary authority of the two Houses of Parliament. The relations between the two Houses have been put on a statutory basis by the Parliament Act of 1911. But the rules regulating procedure in the Houses are based on convention. The judicial functions of the House of Lords are discharged solely by the Law Lords. Convention restrains the law lords from joining in the judicial functions of the House. The whole Cabinet system itself rests on pure convention. Such a thing as the ‘cabinet’ is wholly unknown to the law. That ministers are collectively responsible to Parliament and that the Cabinet resigns if it ceases to command the confidence of the House—in fact, all the distinguishing features of Cabinet government, derive their binding force solely from constitutional practice and usage.

A third group of constitutional conventions regulate the relations between the United Kingdom and the Dominions. The Fiscal Autonomy convention, for example, gave fiscal independence to Australia. The legislative independence of the self-governing Dominions declared by the Statute of Westminster in 1931 was being enjoyed by them previously for some time under constitutional conventions. Even now

the methods of co-operation between and the external relations of the Dominions are essentially based on conventions. The positions of the Governors-General, the mode of settlement of disputes between different parts of the Empire are again matters resting on conventional rules expressed in the reports of Imperial conferences.

Importance of conventions:—The value of constitutional conventions is undoubted. They help us to discover the manner in which the constitution works in practice and ensure the working of the constitution in accordance with the prevailing constitutional theory of the time. Mill says that it is to conventions that we should turn “If we would know in whom the really supreme power in the constitution resides”. If a convention is effectual and maintains itself in existence, it is only because, as we shall later see, it is found to harmonise command respectful obedience when they favour the predominant element in the constitution. In the British constitution the House of Commons is supreme and it is no accident that the conventions are in its favour.

Conclusion:—The Constitution of a state thus comprises both constitutional laws and constitutional conventions. The latter correspond to the actual practice of the constitution and are as a matter of fact observed though they are not enforced in courts. It may, therefore, be concluded that the constitution is both a matter of fact and a matter of law—fact to the extent to which it is based upon conventions alone and law to the extent to which constitutional practices can be enforced in courts.

(3) NATURE OF CONSTITUTIONAL CONVENTIONS

Purpose of conventions:—Let us consider first the *raison d’être* of constitutional conventions. John Stuart Mill explains that conventions are developed to enable the government to be carried on. “In the British Constitution each of the three co-ordinate members of the sovereignty is invested with powers which, if fully exercised, would enable it to stop all the machinery of government”. It is the unwritten maxims or conventions of the constitution which prevent the different organs of the state from thwarting and obstructing one another. Prof. Jennings refers to another purpose which they serve when he remarks that “constitutional conventions provide the flesh which clothes the dry bones of the law; they make

the legal constitution work; they keep it in touch with the growth of ideas". In the first place, therefore, constitutional conventions are required to secure harmonious co-operation between the different limbs of the constitution. In the second place, they are required to ensure that the practice of the constitution does not become anachronistic and keeps pace with the changing circumstances of national life.

Distinction between Constitutional laws and conventions:-- We shall now consider the distinction between Constitutional laws and Conventions. Prof. Dicey points out that the former are enforced by courts, while the latter are not. Conventions have behind them only the force of custom and positive political morality. If this force fails to procure their observance, the courts can furnish no remedy and it becomes necessary to give unequivocal statutory recognition to the constitutional practice. The history of the Parliament Act, 1911, bears out this statement. The House of Lords claimed for a long time the legal right to reject, though not to amend, a Money Bill. In 1860 it rejected the Paper duty Repeal Bill of Gladstone. This provoked the Commons to pass a series of resolutions emphasising that they viewed "with a peculiar jealousy the exercise by the Lords of their power of rejection". In 1861 Gladstone made the provisions of that Bill part of a comprehensive bill of taxation and as the Lords do not have the power of amending a bill, it was passed. From that time the convention developed by which the power of the Lords to reject a Money Bill was curtailed by the practice of sending up an omnibus finance bill which could not reasonably be rejected in *toto*. However, in 1909 Lloyd George's Finance Bill was rejected. The convention was not respected and so it was elevated to a constitutional law by being made the subject-matter of statutory enactment in 1911 by the Parliament Act of that year.

Criticism of Jennings:—Dicey thus distinguishes constitutional laws from conventions by saying that the former alone are enforced by courts of law. Sir Ivor Jennings is, however, of the opinion that there is no fundamental distinction between the two. Dicey's apparently clear-cut and unambiguous distinction on close scrutiny gives rise to difficulties. In the first place, the distinction depends upon the meaning we attach to the ambiguous 'court'. For instance the House of Lords has judicial functions and acts as the final court of appeal of the United Kingdom. In law there is no distinction

between the House of Lords as a court and the House as a part of the legislature. Are the rules which regulate the conduct of business in the House of Lords to be regarded as laws? Jennings points out that even the House of Commons is for certain purposes a court of law. It acts as a court in determining all questions of breaches of Parliamentary privilege, the qualification of members and their right to sit in the House. In the second place, Prof. Jennings asks how there can be any difference between a law and a convention "when the question whether a particular rule is in one class or the other depends upon a decision as little prognosticable as the result of the toss of a coin." Thirdly, Jennings points out that conventions may be the subject of interpretation by courts just as much as laws. One of the fundamental laws of the Irish Free State was that "The Law, practice and constitutional usage governing the relationship of the Crown or the representative of the Crown and of the Imperial Parliament to the Dominion of Canada shall govern their relationship to the Irish Free State."¹ The Irish Court and the Privy Council thus had to apply the conventions relating to Canada in interpreting the constitution of the Irish Free State. This again shows that constitutional conventions and laws have the same essential nature.

Reply to the Criticism :—Notwithstanding Jennings' cogent argumentation and lucid analysis, a few observations fall to be made. In the first place, in conventions generally arise in supersession of the law of the constitution. The legal powers exercisable by a particular organ of the constitution are nullified by the conventions which spring up in the actual working of the constitution. The position of the Governor-General in the self-governing Dominions is an illustration in point. Self-government was born in Canada about 1850 when the Governor-General received instructions to act on the advice of ministers. Profound changes in the balance of constitutional authority are effected by conventions without the literal law being modified. The second observation to be made is that conventions, unlike laws, may be overridden by contrary practice. In fact the purpose of conventions is to secure flexibility to enable the constitution to work within a rigid legal framework. Thirdly, if a convention is not observed, the only remedy is to have it formally

(1) *Constitution of the Irish Free State Act, 1922; Second Schedule, Art. 2*
This Constitution has been repealed by Art. 48 of the Constitution of 1937.

enunciated as ■ constitutional law for the future ■■ was well illustrated by the history of the Parliament Act of 1911.

Why conventions are obeyed :—Dicey was much puzzled by the fact that constitutional conventions are obeyed though they are not enforced by courts. He explained the phenomenon on the footing that a failure to obey a convention would lead to the infringement of some law of the constitution. Since the breach of ■ convention contingently involves the breach of a law which can be enforced in courts, a fear of consequences is engendered which suffices to ensure its observance. Thus it is a convention that Parliament should be summoned once a year. If this is not obeyed, the Army Act would lapse by which the keeping of the standing army would become illegal; and financial legislation of the year would not be passed with the result that no revenues would be legally due. It is thus the fear of impinging against some law that restrains the breach of conventions.

Dicey's analysis no doubt explains the observance of several of the important conventions which determine the relations between the Cabinet and the House of Commons. It is not, however, an exhaustive analysis for there are conventions a breach of which would not lead to a breach of law, but are nevertheless obeyed. For instance, if lay peers decide to sit with the law lords no breach of law would follow, but ■ gross breach of a convention would be committed.

Dicey's thesis involves the assumption that laws are obeyed only because of the possibility that they might be enforced by the coercive power of the state. This assumption, however, does not square with social facts, for conventions and laws alike are obeyed because of the social habits of the people and the acquiescence of the people in their validity. The real reason why conventions are obeyed is to be sought in the necessity which has given rise to the convention. So long as the necessity exists the convention is naturally obeyed. Conventions secure the harmonious co-operation of the various organs of government. A constitution is the integration of the activities of many individuals. Each of them has to fill his allotted part. The conventions of the constitution help in this and, if they are not followed, difficulties would arise. They are obeyed because the difficulties which they were intended to obviate would recur if they are not obeyed and complications in government would ensue.

CHAPTER XIII

ADMINISTRATIVE LAW

Public law :—The activity of the state is regulated largely by public law which is broadly divisible into Administrative law and Constitutional law.

Administrative Law defined :—Administrative law is classified by jurisprudential writers as a sub-division of the Public law. It is the law which defines the organization, powers and duties of administrative authorities. According to Dicey, Administrative law determines (1) the constitution and the relations of those organs of Society which are charged with the care of those social interests which are the object of public administration, by which term is meant the different representatives of Society among which the State is the most important and (2) the relation of the administrative authorities towards the citizens of the State.”¹

Distinguished from Private Law :—Administrative law has to be distinguished from Private Law. The latter is applied by the ordinary courts or judicial tribunals of the country. Questions of Administrative Law, on the other hand, are matters for the administrative authorities concerned and are largely outside the jurisdiction of courts. The law relating to the civil service, for instance, has been made and is governed by the decisions of administrative departments. The distinction between a judicial and an administrative tribunal is pointed out by John Dickinson in his book *‘Administrative Justice and the Supremacy of law.’* He says: “The crucial qualities of a common law court which are absent from the administrative tribunals are at least three, two of them being procedural and one substantive. Administrative tribunals are not bound by the procedural safeguards which mould the outcome of an action at law; more specifically, they are in the first place not bound by the common law rules of evidence, and in the second place, parties to proceedings before them do not have the

(1) Dicey : *The Law of the Constitution* p. 328, 329.

benefit of a jury trial. The substantive difference between administrative procedure and the procedure at law is that the administrative tribunals decide controversies coming before them, not by fixed rules but by the application of government discretion or policy".¹

Distinguished from Constitutional law :—Constitutional law deals with the structure and functions of the supreme power in the State. It describes the details of the organization of the legislature, the Executive, and the Judiciary and determines the relations *inter se* of those organs of the State. Administrative Law pursues the plan of governmental organization into its minutest details and concerns itself with the numerous subordinate bodies, through which the governmental authority manifests itself.

Dr. Holland explains the distinction between constitutional law and administrative law as follows:

"The various organs of the sovereign power are described by constitutional law as at rest; but it is also necessary that they should be considered as in motion, and that the manner of their activity should be prescribed in detail. The branch of law which does this is called Administrative law"².

(1) Dickinson: *Administrative Justice and the Supremacy of Law* p. 37.

(2) Holland: *Jurisprudence*, p. 363.

CHAPTER XIV

PERSONAL LAWS AND TERRITORIAL LAWS

Personal laws and territorial laws:—Laws are either personal or territorial. The Hindu law or the Madomedan law is a system of personal law. It is a law of personal status and its applicability is dependent upon the person concerned being a Hindu or a Mahomedan or as the case may be. Such personal laws should be distinguished from territorial laws. A territorial law is a *lex loci* or law of a particular place and applies to all persons inhabiting the territory of the state irrespective of their personal status. The Indian law of Contracts, for instance is a territorial law in this sense.

Territorial Enforcement of Law:—Law as a body of rules applied in the administration of justice is an abstract idea and has as such no local habitation. It is usual, however, to link law to some territory. Thus we speak of the law of Bharat or the law of England. Law has to be enforced by a state and the power of the state does not extend beyond its territory. So the enforcement of law can only be territorial. If a person commits a crime in one country and escapes to another country, he is beyond the reach of the state where the crime is committed and punishable according to law. This is because that state cannot exercise any jurisdictional authority within the territory of the state to which the criminal has escaped. However, the mutual interest of states in the maintenance of order and justice demands that states should co-operate with one another by surrendering fugitive criminals to the state in which the crime was committed. This is achieved by means of treaties of extradition. The existence of treaties of extradition emphasizes the fact that the enforcement of law can only be territorial.

Territoriality of Law:—When one speaks of the law of Bharat, one does not mean merely that the law in question is enforced in Bharat. Such a statement postulates not merely the territorial enforcement of law, but the territoriality of the law itself. Law is territorial in the sense that its operation itself is territorial. Usually the laws made by a legislature apply to persons and things which are

within its jurisdiction or in respect of acts and events taking place within such jurisdiction. An extra-territorial element enters into the legislation when it is to operate upon persons or things or in respect of events and acts outside the territorial jurisdiction of the legislating state. A sovereign legislature can make even such extra-territorial laws and the duty of the courts in such a case is to give effect to them. Further, courts have to apply a branch of law known as the conflict of laws or international private law. In so doing Foreign law is applied to indigenous litigation. Thus it is possible for a foreign system of law to be enforced in the territory of another state. The existence of extra-territorial laws and conflict of laws indicates that the territorial idea is not an essential element of law. Indeed, as Salmond suggests, in the ultimate analysis law will be found to be that of a particular court rather than that of a particular state. Thus the law of England is the law enforced by its courts. Part of this law may be the law of another country for such law may also be applied by the English Courts in accordance with the English international private law.

CHAPTER XV

SPECIAL LAW

Personal Laws in India :—In India the most important kind of special law is the personal law of the Hindus and of the Mahomedans. A personal law applies to the members of a particular race or adherents of a particular religion. It is not the territorial law of the country, but is yet applied in appropriate cases by judicial tribunals in administering justice. It is thus a form of *jus speciale*.

Six forms of special law mentioned by Salmond :—Sir John Salmond makes mention of six forms of special law. They are Local law, Martial law, Foreign law, Prize law, Conventional law, and Autonomic law.

(1) Local law :—Local Law is the body of law which obtains only in certain parts of the state and not throughout its territory. There may be customs which have obtained the force of law in certain localities. Within those localities such customary law supersedes the general law. In England, for instance, before Jan. I, 1926, real property devolved in Kent according to the custom of Gavelkind and in Nottingham according to the custom of Borough English. By Gavelkind all the sons of the deceased owner, and not merely the eldest as under the general law, became equally entitled to his real property, while under Borough-English the youngest son alone inherited such property. Customary local law is found in India also. An easement right to privacy does not exist under the general law, but can be claimed by custom in the United Provinces, Sind and Gujarat. Apart from agreement, a right of pre-emption in respect of immovable property cannot be claimed under the general law, but such a right is recognised by custom among Hindus in Bihar.

Besides local customary law, there may be local enacted law also. The latter consists of the enactments emanating from subordinate local legislative authorities. If these enactments are *intra vires* of the local legislative body promulgating them, they are recognised as having full force in the locality for which they have been formulated. The Madras City Improvement Trust Act, 1950, for instance, applies only to the City of Madras. It creates a local law only and is not the general territorial law of India.

(2) **Martial law** :—Martial law, as its name implies, is the law administered in the courts maintained by the military authorities. The administration of justice is in certain cases carried on by the army through certain courts called Courts Martialestablished for the purpose within the army. Martial law or the law which is administered by Courts Martial is of three kinds.

When the army occupies alien lands during the prosecution of war, it has to govern the foreign territories which come under its control. The rules established for this purpose by the good pleasure of the military authorities is one kind of martial law. A second form of martial law is that by which the army governs the realm in supersession of the normal civil law for the preservation of the public safety in abnormal times of trouble and danger. The state proclaims martial law when a state of war exists either because an emergency arises on account of a foreign invasion or owing to an internal rebellion. Military justice is then rendered by the courts martial. It need hardly be mentioned that the state would be justified in thus substituting military for civil justice only if there exists an unmistakably grave situation menacing the public safety. The third kind of martial law is the disciplinary law for the government of the army itself. This is commonly called Military law and it applies to the army in times of peace as well as in times of war. Unlike military law, the other forms of martial law above noticed apply to the civilians also and are enforced only in a state of war. Besides, military law in England proceeds from statutory authority being contained in the Army Act, whereas the other forms of martial law emanate from the Royal Prerogative. Thus there are some points of distinction between military law and the other forms of martial law.

(3) **Foreign law** :—Occasionally the courts of a state find it necessary in adjudicating a case to apply rules and principles which are not a part of its general law but form part of the territorial law of some foreign country. International Private Law deals with the considerations which render expedient the application of foreign laws to indigenous litigation.¹

(4) **Prize law** :—Prize law is that portion of international law which relates to the determination of the legality of the captures of

(1) *For a fuller discussion of the nature of Foreign law and Prize law, see part VI—"International law."*

ships and cargoes at sea in time of war. This law is enforced by the municipal courts of a country although it is not part of its general law.¹

5. Autonomic law :—Law strictly so called or positive law is enforced by the state. Such law is usually set by the sovereign himself. Sometimes it may be set by private persons acting in pursuance of their legal rights. Laws established by private persons to which the sovereign power lends its sanction or authority, are called autonomic laws. The bye-laws of a Railway company or the rules made by a University for the government of its members are instances of Autonomic laws.

6. Conventional law :—Conventional law originates in agreement and is law for those who have agreed to be bound by it. Even if conventional rules are not enforced by the state, they constitute law in the generic sense of a rule of human action. But where they are enforced by the state, they are regarded, along with Autonomic law, as part of the Civil law.

Distinction between Autonomic law and Conventional law :—Autonomic law resembles conventional law in that both are created by private persons. There is, however, a vital distinction between the two. Conventional law derives its efficacy from agreement and, therefore, binds only those who have consented to its creation. The binding force of Autonomic law is independent of agreement. Salmond explains distinction between the two kinds of law by referring to an incorporated company governed by articles of association. When the company is first formed all the shareholders agree to those articles and are bound by them because of such agreement. The articles of association are thus to start with a body of conventional law. The shareholders are given by law a limited legislative authority by virtue of which they can alter the original articles of association according to the decision of the majority of their body. In the exercise of this authority, the majority can impose its will upon a dissentient minority and when they do so and alter the articles of association, they exercise powers of autonomous legislation. Autonomic law is thus a species of legislative activity and is imposed as it were, by superior authority while conventional law is based purely on agreement.

(1) For a fuller discussion of the nature of Foreign law and Prize law, see part VI—"International Law."

CHAPTER XVI

THE COMMON LAW OF ENGLAND

Technical Meaning :—By the common law of the country we mean its general law. In England, however, it has a technical meaning. Salmond defines the Common Law as “the total *Corpus Juris Angliae* with three exceptions, namely (1) special law in its various forms, (2) statute law and (3) equity.” To explain how the Common Law came to be and acquired this technical connotation it is necessary to survey the historical growth of the English Common Law.

(1) HISTORICAL ACCOUNT OF THE ENGLISH COMMON LAW

No Common law in the Anglo-Saxon Period :—Britain enjoyed the benefits of Roman institutions till the recall of the Roman legions from Britain about the year 410 A. D. After the withdrawal of the Romans England was occupied by the Angles, the Saxons, and other Germanic tribes. The extant collection of Anglo-Saxon laws do not give us a complete view of the legal or judicial institutions of the time. Aethelberht (560-616) made a collection of the dooms in force in his day, but his code makes no attempt at the construction of a complete body of law. Only the novel and uncertain portions of the law were dealt with while the normal and undoubted rules of customary law were left alone apparently because they were too well known to the elders to require formal enunciation in writing.

England was divided into Shires or Counties which were subdivided into Hundreds. The County and the Hundred had courts. The Hundred court, which was the judicial unit for ordinary affairs, sat once every four weeks while the Shire court sat twice a year and administered justice according to the customary law. The Anglo-Saxon laws solemnly forbid the taking of law into one's own hands before first demanding one's right in the proper court. This clearly shows that law was only then emerging as the rule of life. The courts had no efficient means either of compelling the attendance of the parties or of enforcing their orders. Judicial procedure was itself of an extremely primitive character.

To decide a case the court required the party on whom the burden of proof lay to 'wager his law'. That is it required him to take an oath to the truth of his case along with a number of his compurgators or oath-helpers—the number varying according to the nature of the case and the rank of the parties. If the oath taking was successfully accomplished, the party was said to have successfully 'waged his law' and the truth of his case was regarded as thoroughly established. The person on whom the burden of proof lay had thus a decided advantage. Sometimes, however, in criminal cases particularly, the oath was reinforced by the ordeal, when the above advantage became very illusory indeed!

"The complicated civil procedure and the inefficiency of the legal process noticed in Anglo-Saxon law are thoroughly characteristic of archaic legal systems in general"¹. We are reminded of Sir Henry Maine's remark that the formalism and technicality of procedure is "the disease not of the old age, but of the infancy of societies"².

Norman Period: Gradual Rise of the Common Law:--In the Anglo-Saxon period there was no common law for all England. There were three distinct systems of law—Wessex Law, Mercian Law and Dane Law. In the early Norman period there was the further complication introduced by feudalism, the fundamental principle of which was that questions of land tenure were for the decision of the lord of whom the disputants held their lands. The baronial court thus claimed a local jurisdiction which had to be superseded before a common law for England could emerge. This supersession, was effected when by the gradual assertion of the supremacy of Royal justice "above all local courts rose the custom of the King's Court, the tremendous empire of Kingly majesty"³. Mr. Carter points out that the common law of England was produced during "the period which lies between William I and Edward I when Royal Justice gradually dwarfed and finally superseded all other justice"⁴.

Royal writs:—The triumph of the King's court was achieved by the instrumentality of royal writs. By the time of Glanville, chief justiciar of Henry II (1154-89) a royal writ had been invented

(1) Pollock and Maitland: *History of English Law*, P. 19.

(2) Maine: *Early Law and Custom* CHAP. 6.

(3) Pollock and Maitland: *History of English Law*, P. 85.

(4) Carter: *History of English Legal Institutions*, P. 46.

called a *Prapcipe quod reddat* which could be sent to the sheriff on a complaint by a tenant of the freehold that he was 'deforced' of his land and thus have the case taken out of the lord's court. By means of the Writ of right the lord could be directed to do "full right" to the plaintiff, and if he did not comply with the direction, the King's officer could do it for him. By the writ of 'Pone,' the King's court could call up a cause from the sheriff's court. "The invention of the writs" as Holdsworth points out, "was really the making of the English Common law"—and this took place between 1150 and 1250.

The Common Law Courts—The Exchequer:—The legal history of England, as Holdsworth points out, must begin with the history of the courts for the main body of English legal doctrine has been and is still being made by means of the decisions of the courts. The King's Court consisted of a small body of great men who usually surrounded the king and assembled as *Curia Regis* on the three great feasts of the Church—Easter, Pentecost, and Christmas—when the king wore his crown. The *curia regis* very early threw out an administrative department—The Exchequer—to deal with the collection of the royal revenue. Law and revenue being intimately related, the Exchequer, presided over by a Chief Baron, began to act as law court and exercise jurisdiction also in common pleas i.e., cases in which both parties were subjects and so distinguished from, Crown pleas or cases in which the crown was a party. This jurisdiction over ordinary civil cases was acquired by an ingenious device, known as the *writ of Quominus*. This writ was based upon the fiction that the plaintiff owed money to the king and the defendant to the plaintiff, so that the delay of the defendant to pay the plaintiff caused the latter to be in default to the king—"whereby," so the writ goes; "the plaintiff is the less (*quominus*) able to satisfy us the debts which he owes us in our said Exchequer."

Court of Common Pleas:—The Royal court followed the king in his progresses and so suitors had to make wearisome journeys to obtain Royal justice. In the *Magna Charta* (1215) it was provided by Art XVII that the common pleas were not to follow the king. The Court of Common Pleas, originally called the Common Bench thus became stationary and located at Westminster.

The Court of King's Bench:—After the court of Common Pleas became stationary, the court which accompanied the king

and travelled about the country was called the court of the King's Bench. The business of this court was to try criminal offences and misdemeanours amounting to a breach of the peace. In the reign of Edward III (1327-77) this court also became stationary.

Though the King's Bench was a court of criminal jurisdiction, it acquired jurisdiction over civil cases by employing the writ of *Latitat*. This writ was issued to the sheriff of the country where "it is sufficiently attested that the aforesaid R (defendant) lurks (*latitat*) and runs about." The defendant was then arrested and the proceedings would continue in the King's Bench. Thus by the fiction that the defendant had committed a breach of the King's peace jurisdiction was secured by the King's Bench over civil causes.

Two special writs that issued from the King's Bench were the writs of *Mandamus* and *certiorari*. By the former any person, corporation or inferior court would be commanded to do some particular thing specified therein appertaining to its office or duty which the court of King's Bench deemed to be necessary in the interests of justice. The writ of *certiorari* was issued to judges or officers of inferior jurisdiction to have proceedings before them sent for scrutiny to the Court of the King's Bench.

These writs served much to undermine local jurisdictions and establish the primacy of Royal justice. By the time of Edward I (1272-1307) the king's justice was finally established and the judicial institutions assumed the form which they retained till 1875.

(ii) SCOPE OF THE COMMON LAW

Original meaning:—General Law:—We have seen that in the period which lies between William I and Edward I the King's Courts gradually superseded all local authorities and created the common law of England. The custom of the King's courts was the common law and it was supposed to be based on the immemorial usages of the realm. At its origin, therefore, the term 'common law' signified the general law of England.

Contrasted with Equity:—By the beginning of the fourteenth century the Court of Chancery arose and began to administer justice by the side of the common law courts. Its special doctrines, known as Equity, were distinguished from the *jus commune* as a form of spe-

cial law. Equity was finally absorbed into the general law when the Judicature Act of 1873 united the common law and Equity jurisdictions. Though equity and common law have thus become co-ordinate parts of a single system of general law, the original distinction between them still persists and the term 'Common law' is even now used in contrast with Equity. Since the general law of England includes Equity, it is clear that the common law represents only a part of the general law.

Contrasted with Statute Law :—The term 'common law' excludes also the statute law of England. Statutory enactments were very early regarded as innovations upon the ancient English customs represented by the common law. They were looked upon as a form of special law standing apart from the general law of the land. At the present day so great and all embracing is the legislative activity of the state that statute law is rightly recognised as much a part of the general law of the land as the common law itself. However, the ancient distinction between statute law and common law still persists in English legal doctrine.

Judicial Decisions interpreting Statute Law :—Case law arising out of the interpretation of Statutes is not regarded as part of the Common law. It forms part of the statute law out of which it proceeds.

Definition of common law :—In the light of the foregoing discussion, the sphere of the English Common law may be described in the words of Salmond as follows : "The common law is the residue of the general law of England, after excepting statute law and equity".¹ The same idea is expressed in another way in Salmond's observation that the "common law is the entire body of English law—the total *Corpus Juris Angliae*—with three exceptions, namely (1) Special law in its various forms (2) Statute law and (3) Equity".²

(1) Salmond: *Jurisprudence*, P. 85,

(2) Salmond: *Jurisprudence*, P. 96.

PART FOUR

JUSTICE AND JUDICIAL PROCESS,

*“Remota justitia quid sunt regna, nisi magna latro-
cinia.”—Augustini.*

*(Without justice, what is empire, but robbery on a grand
scale.—Augustine).*

CHAPTER XVII

LAW AND JUSTICE

(1) LEGAL JUSTICE AND NATURAL JUSTICE

Justice is of two kinds—natural or moral justice and legal justice. The first of these represents the ideal to which the second endeavours to approximate. Natural justice is revealed by the divine reason implanted in the human mind and all human endeavour should be directed to conforming to it. When the state finds that some portions of natural justice are so important that their observance cannot be left to the option and good sense of each individual, it formulates them in the form of legal rules conformance to which is obligatory on the part of the subjects. The justice dispensed by the court in accordance with these rules is legal justice or justice according to law.

Hobbes has declared that “no law can be unjust”. This dictum has been deemed by many to be a pernicious paradox. Austin says that the proposition is neither paradoxical nor pernicious for it simply means that “no *positive* law can be *legally* unjust”. Just or unjust, justice or injustice are terms of varying import. A determinate meaning can be attached to them only when a determinate law is assumed as the standard of comparison. If positive law be taken as the standard of comparison, it is evident that positive law cannot be unjust, for it cannot be unequal to itself used as a measure.

One of the essential functions of the state is the administration of justice. Law is the instrument of justice. In every modern state we find authoritative rules formulated for the guidance of those to whom the state has entrusted its judicial functions. Courts of justice are also courts of law, for justice has to be rendered according to law. The necessity of this may now be examined.

(2) “THE LAW IS WITHOUT DOUBT A REMEDY FOR GREAT EVILS, YET IT BRINGS WITH IT EVILS OF ITS OWN”—Salmond.

Advantage of Legal justice :—According to Sir John Salmond the administration of justice according to fixed principles of law

secures three indubitable advantages. In the first place, a legal system ensures uniformity and certainty in the administration of justice. One need not expatiate upon the value of certainty in the administration of justice. Law as a guide to conduct would become utterly futile if it were not certain and known to the people. A body of declared law is thus the normal requirement of society. The judges knowing what the rules are can enforce them uniformly; the citizens knowing them can shape their conduct accordingly.

Secondly, law is a guarantee of impartiality in the administration of justice. If judges may adjudicate in such manner ■■ best commends itself to them, they may sometimes be influenced by improper motives. If, however, they are to decide in accordance with pre-determined legal principles, they cannot yield to personal motives, for a vigilant public can easily observe the departure from the rule of the law and take steps to redress the mischief. Law is not made with reference to any particular case or to suit the convenience of any particular person. Hence by following fixed legal rules impartiality is secured.

There is a third reason why justice should be according to law. Man's reason is too fallible a guide to discern with its exclusive aid the true principles of justice. The rules of law represent the collective wisdom of the community and its carefully thought out opinions as to what is expedient. The judge by availing himself of the experience and wisdom of the community as recorded in the law is more likely to come to sound conclusions than if he has to rely solely on his own sense of right and justice. The wisdom of the law, "as Lord Coke said, "is wiser than any man's wisdom".

Law thus secures uniformity, certainty and impartiality and acts as a corrective to the fallibility of individual judgment. These are undoubtedly great benefits, but just as every rose has its thorns, even the legal system has its own evils and disadvantages.

Disadvantages of Legal justice :—The usual defect of a legal system is its rigidity which consists in the failure of the law to conform itself to the requirements of unforeseen classes of cases. In the complex conditions of society it is not possible to frame a legal rule ■■ ■■ to cover and do even justice to all the human problems that may arise with reference to that rule. The rigid application of the rule may therefore entail hardship and result in

injustice in some individual cases. But the existence of the rule of law excludes the rational discretion of the judge. The law has to be given effect to, however unconscionable it may be in the context of the special facts of a particular case. 'Hard cases should not make bad law' is the maxim by which judges are guided, and so fixed legal principles by cramping judicial discretion impart rigidity to the legal system.

Conservatism is another vice of the legal system. Society is progressing and this progress is reflected in the changed outlook of men. With the march of time men's views of truth and justice undergo an inevitable change. The law has to conform itself to these changes in society's view of truth and justice. Law is, however, inherently a stationary and conservative force. In order to bring it into harmony with the opinions of the time, it has to be changed and new principles substituted for the old. The state has found an efficient instrument for this purpose in legislation. The distemper of conservatism, however, continues to afflict the legal system and it is a truism that law is as much behind public opinion as public opinion itself is behind our ideal of justice.

A third vice of the law is formalism or technicality. Being obliged to conform to a fixed legal system, the judge is apt to attach to legal technicalities a significance which they do not deserve and give effect to legal quibbles that sometimes smother justice. This tendency to give undue prominence to form as opposed to substance is known as formalism and is the fatal weakness of every inflexible legal system.

Finally, needless complexity is the common frailty of modern legal systems. This vice is attributable as much to the complex facts of civilised existence as to the notorious subtlety of the legal mind. Nowadays codification is being undertaken to minimise this trouble.

Conclusion :—We have thus observed the advantages as well as the disadvantages that arise from causing justice to be administered in accordance with law. As has been well said by Salmond: "The law is without doubt a remedy for greater evils, yet it brings with it evils of its own".¹

(1) *Salmond : Jurisprudence* : p. 48.

(3) PRIVATE JUSTICE AND PUBLIC JUSTICE

In primitive times the state did not have an organization sufficiently powerful to enable it to enforce its decrees among its members. Disputes were seldom submitted to state authorities. The injured party could take compensation from the wrongdoer or get such satisfaction as could be derived from an act of revenge. The vindication of his rights was entirely in his own hands. This kind of primitive justice is called private justice.

As the state grew in power it naturally took upon itself the work of *Supervision* of the crude self-help resorted to previously by the people for protecting their interests. Its role at first was that of an arbitrator. The state fixed the compensation for injuries but prudently left it to the injured party to accept it or not in his discretion. The measure of liability at this stage was determined by the intensity of the offended feelings and retributive vengeance of the injured person. The idea was to placate the parties and make them accept the arbitration of the state. In course of time the state becomes powerful enough to compel the parties to accept its arbitration. Judicial tribunals are set up charged with the function of dispensing justice. Justice rendered by the state in this manner is called public justice.

(4) HOW JUSTICE IS ADMINISTERED

In the administration of justice—civil or criminal—the judge has to enforce the law. The law, however, can be applied only when the facts have been ascertained. The function of the judge, therefore, is, in the first place, to sift the evidence and ascertain the true state of facts and then to determine the rule of law by which those facts are governed.

Questions of Law and Fact:—The duty of the judge is to decide questions of law and of fact.¹ A question of law is understood in more than one sense. First, it may mean the precise rule of law in regard to a given point. Thus when the terms of a statute are ambiguous, the judge has to explain its true meaning and determine its precise scope. By removing the ambiguity or uncertainty, the judge settles a question of law. What the statute really means no doubt appears to be a question of fact, but once the judge has authoritatively defined its meaning, the true intent of the statute is legally settled and cannot thereafter be a question of fact. In this way

1. In England questions of fact are decided by the jury.

certain questions of fact have a tendency to be converted into questions of law.

Secondly, questions which have to be answered in accordance with a pre-existing rule of law are also questions of law. A pure question of fact of course is not predetermined by a rule of law. A question becomes one of law when the answer to it is not to be suggested by unaided commonsense, but by a rule of law though the rule itself may have its basis in sound reason. In India there is a conclusive presumption that no child under the age of seven years can be guilty of an offence. The question whether a child under the age of seven can be guilty of an offence is one of law for the answer to it should be given in accordance with a rule of law. Legal presumptions of this kind sometimes produce a discordance between fact and law. For instance, a child may demonstrably be a bastard, yet under Sec. 112 of the Indian Evidence Act there is a conclusive presumption of legitimacy in its favour if the child was born during the continuance of a lawful wedlock and the husband had opportunities of access to the wife when the conception of the child might have taken place.

A question of law has yet a third meaning in England. There every question which falls within the province of the judge's work as distinguished from that of the jury is regarded as a question of law. Thus in an action for defamation, it is for the court to determine as a matter of law that the words used are capable of being understood in a defamatory sense, but it is for the jury, if the words are so capable, to determine whether in fact that defamatory meaning was properly attached to them¹.

Judicial discretion :—Besides questions of law and of fact there arise for a judge's decision questions which call for the exercise of his discretion. The discretion, however, is not an arbitrary or capricious discretion but a judicial discretion which has to be exercised on a careful consideration of all the circumstances with due regard to the demands of expediency. Thus the question, for instance, whether the proprietary rights of the parties to a litigation require protection during the pendency of the legal proceedings, by the suit property being placed in the hands of a receiver, involves the exercise of judicial discretion.

(1) *Australian Newspaper Co., v. Bennet*, (1894) A. C. 284 at 287.

Sometimes questions of fact, law and discretion have all to be judiciously weighed before justice can be administered. In trying an offender, for instance, the question whether he has committed the acts complained of is a question of fact; what offence these particular acts constitute is a question of law; and the measure of punishment that should be meted out the offender is largely a question of discretion. All these questions have to be answered before justice can be done and so a judge devoted to the efficient administration of justice should be painstaking in the ascertainment of facts, conscientious in the application of the law and judicious in the exercise of his discretion.

CHAPTER XVIII

THE JUDICIAL PROCESS

(1) SUBSTANTIVE LAW AND ADJECTIVE LAW

Holland's view :—According to Holland substantive law defines and creates rights, while adjective law or procedural law provides a method of aiding and protecting those rights.¹ It is thus suggested that substantive law deals with rights while adjective law deals with remedies.

Criticism :—Salmond rejects the above distinction for two reasons:² Firstly, the whole law of remedies does not belong to procedure. A right to recover damages is a remedial right, but it does not appertain to procedure. Secondly, in the realm of procedure there can be rights. Procedural law too can create rights. A right of appeal is not merely a matter of procedure but one of substantive right³.

Salmond's view :—It is difficult to draw a clear line of demarcation between substantive law and the law of procedure for the difference between the two is one of form rather than of substance. Some rules of procedure may be cast in the form of rules of substantive law. Thus the rule of evidence that a child under eight years of age is incapable of *mens rea* is identical with the substantive rule that a child under eight years of age cannot be punished for a crime. In fact every conclusive presumption appertains to procedure only in form, for in effect it lays down a rule of substantive law. Rules of substantive law are sometimes susceptible of statement as procedural rules. The substantive rule that one can acquire a prescriptive title by adverse possession is paralleled by the procedural rule that the bar of limitation sets in when the prescriptive period has passed. Thus the difference between adjective law and substantive law is merely one of form. A distinction, however, may be drawn thus: "The

(1) Holland : *Jurisprudence*. 89.

(2) *Hossein Kasam Dada v. State of Madhya Pradesh*. (1953) S. C. R. 987
Colonial sugar Refining Co. v. Irving (1905) A. C. 369; *Eswaramma v Seethamma* (1955) A. L. T. (Civil) 444 at 456. (F. B.)

law of procedure is that branch of the law which governs the *process* of litigation.....All the residue is substantive law ”¹

Criticism:—It may be pointed out that Salmond's definition of procedural law as the *process* of litigation is merely a description of it in terms of itself. However, in view of the fact that procedural law differs from substantive law only in form, it is difficult to discover a purely logical test that can make a clear-cut division. In the circumstances Salmond's definition may be accepted though it does not satisfy the criteria of a logical definition.

(2) ELEMENTS OF JUDICIAL PROCEDURE

The elements of judicial procedure are the following :

(1) **Summons:—**Summons is the citation to appear before the court. When the jurisdiction of the court is invoked, a summons is served on the claimant's opponent (defendant) requiring him to appear before the judge for presenting his case. If the summons is not obeyed by the defendant, judgment may be given against him in his absence (*ex parte*).

(2) **Pleadings:—**The pleading in the formal statement by the plaintiff of his cause and the defendant's reply thereto. Its object is to isolate the issues on which the parties are not agreed and on which adjudication by the court is sought.

The defendant may deny the facts alleged by the plaintiff. This is called a *traverse*. He may deny his legal liability on the assumption that the facts are true. This is called a *demurrer*. The defendant may admit the facts alleged by the plaintiff but plead that there are other facts which would negative his claim. This kind of pleading is called *confession and avoidance*. On the basis of the pleadings the court settles the issues between the parties.

(3) **Proof:—**Proof is the process by which the parties furnish the court with the material for deciding upon the issues arising from the pleadings. In modern times proof is made by means of the production of evidence.

1. *Salmond: Jurisprudence* (10th Ed.) 476.

(4) **Judgment** :—Judgment is the decision of the court and is based upon the evidence placed before it. It may relate to a right to property, or an ascertainment or dissolution of status, or declaration of the validity of a legal act, or an award of damages or an order for specific performance. The losing side is usually saddled with the 'costs' to which the successful party has been put in consequence of the suit. The unsuccessful party may challenge the soundness of the decision by preferring an appeal to a higher court, if the right of appeal exists in such a case.

(5) **Execution** :—In execution the successful party calls upon the officers of the court, or other appropriate state functionaries to use, either against the judgment-debtor's person or his property, such force as may be necessary to carry the judgment into effect.

These are the five important elements of judicial procedure in modern times.

(3 KINDS OF EVIDENCE

Evidence :—The facts in issue, that is the facts to be proved, are called *Principal* facts ; the facts on which reliance is placed for proof of the principal facts are evidential facts. An evidential fact is one which induces belief as to the existence of the principal fact. The quality of the evidential fact whereby this effect is produced is called its probative force. Evidence is defined by Salmond as any fact having probative force. By the word 'fact' we mean a state of things that can be perceived by the senses, e.g., whether A had a gun, or a state of mind e.g., whether A had a motive to commit a crime.

1. **Direct and circumstantial Evidence** :—Direct evidence is that which proves the existence of a given thing or fact either by the production of the thing or by the declaration of a witness who has seen the thing or observed the fact. Such evidence may not always be available. A murderer, for instance, would take care to see that there are no eye-witnesses to his crime. If direct evidence alone were to be admissible, courts would be seriously handicapped in such a case. Courts therefore permit the proof of other circumstances which would render probable the fact to be proved. In a case of murder, for instance, the foot-prints or finger-prints of the accused, his conduct before and after the crime, e. g., his purchasing a gun or

running away from the scene of occurrence, would all be circumstances from which the guilt of the accused may be inferred. Evidence of this kind is called circumstantial evidence.

2. Primary and secondary Evidence :—Of two instruments of proving the fact in issue, the more immediate is regarded as primary while the less immediate is regarded as secondary evidence. If the contents of a document are proved, then that document itself would be primary evidence. A copy of the document would be secondary evidence. Where primary evidence is available, usually secondary evidence would be inadmissible.

Oral, Documentary and Material evidence :—Oral evidence consists of words spoken by a witness in court. Documentary evidence consists of documents admitted in court. Material evidence consists in the production of material *res* other than a document, the knife or other instrument with which a murder is committed.

(4) METHOD OF PROOF

The mode in which facts are to be brought to the notice of the court is determined by various rules. These rules deal with questions such as the following :

(1) Exclusion of Evidence :—A court should base its judgment only on evidence that is properly laid before it in accordance with law. It should not decide on the basis of other materials, such as information obtained outside court or the Judge's personal knowledge.

A confession made to a police officer is excluded from evidence. If a person is in police custody, his confession can be received only when it is made in the immediate presence of a magistrate and recorded in the manner prescribed by the Code of Criminal Procedure.

A witness whose intellect is too feeble and defective to understand the nature of an oath is not a competent witness and so his evidence should not be accepted though he may be willing to give evidence. Oath provides a religious sanction for the honesty of the witness. In India a Christian takes the oath on the Bible saying "I swear that I speak the truth and nothing but the truth; so help me God." A Hindu or a Muslim takes the oath on a religious scripture. If a witness has conscientious objection to take the oath, he

may affirm solemnly that he speaks the truth. If a falsehood is uttered by a witness, there is also a legal sanction for he can be prosecuted and punished for the offence of perjury. The statement of a witness not taken on oath or affirmation is not evidence.

(2) **Exclusive Evidence**:—The rule declaring certain facts to be exclusive evidence is another rule which facilitates the work of the court in the evaluation of evidence. In India certain documents require attestation, e. g., gift of immovable property, mortgage, will etc. Such a document cannot be proved except by the testimony of one at least of the attesting witnesses. If all the attestors are dead the stringency of the rule will be relaxed and other testimony would be admitted. If a transaction required by law to be in writing has been reduced to writing, it can be proved only by the production of that document. By rules such as this the task of the court in judging the merits of the evidence tendered by the parties is facilitated.

Relevance and Admissibility of Evidence:—There are also rules governing the relevance and admissibility of evidence. Whatever is logically probative, i. e. capable of aiding in proving the desired conclusion, is said to be relevant. Usually facts which are not relevant cannot be proved. All relevant facts may not be admissible in evidence. What is legally receivable in a court of law is said to be 'admissible'. Evidence of the past record and character, of a person may seem logically relevant to determine his guilt, but it is legally inadmissible for that purpose. Hearsay evidence, of what one has heard but does not know at first-hand to be true is also inadmissible. The reason for excluding hearsay evidence is that the person who made the original remark has not been cross-examined about it and that a story not infrequently grows in the telling.

Modern devices:—In modern times as a result of scientific developments significant advances have been achieved in regard to mode of proof. One scientific device is the lie-detector. It works on the theory that an emotional reaction is produced in the criminal when he is asked a question concerning the crime and that this reaction affects his breathing, blood-pressure, heart-beat and pulse-rate. The lie-detector is a contrivance for measuring the difference between the reaction of the person interrogated to irrelevant questions and questions concerning the crime. Scopolamin is a drug which induces in the person to whom it is administered a state border-

ing upon unconsciousness. It leaves him able to answer questions while disabling him from fabricating or investing and is therefore useful in investigating the truth. These and similar contrivances, however, have not yet been so thoroughly perfected as to be fool-proof and so have not yet come into common use in courts of law.

(5) ASSESSMENT OF EVIDENCE

Evaluation of Evidence :—After the evidence has been received by the court there remains the problem of evaluating it and determining its weight. The determination of the probative value of evidence is governed by certain rules.

(i) **Legal presumptions :—**The task of assessing the value of evidence is rendered easy by means of legal presumptions. A legal presumption is: an inference which the law directs should be drawn from a specific fact.

Distinguished from presumption of fact :—A legal presumption should be distinguished from a presumption of fact. The latter are inferences which are naturally drawn from given facts by logical reasoning irrespective of their legal effect. A legal presumption, however, is one drawn by the direction of law and not merely by a process of natural and logical reasoning,

Rebuttable and Conclusive presumptions :—Legal presumptions are either conclusive or rebuttable. A conclusive presumption is an inference of such strength that the law does not allow it to be combatted by other evidence. If it is shown that ■ child is under seven years of age, the conclusion directed by the law is that the child is incapable of *mens rea* and cannot be held guilty of ■ crime.¹ No contrary evidence will be allowed to be adduced to overthrow this conclusion. Such a presumption is said to be a conclusive presumption. The presumption of innocence in favour of an accused person is a rebuttable presumption. It is valid only until it is overthrown by contrary proof.

Conclusive presumption distinguished from legal fiction :—In the case of a legal fiction the law permits a false averment to be made and bars its contradiction by the opposite party. It was in this way that the court of Exchequer, which had to deal with revenue collection

1. See Indian Penal Code Sec. 82.

obtained jurisdiction over civil causes. The plaintiff was allowed to allege falsely that he was the king's debtor and thus invoke the jurisdiction of that court. By resorting to this fiction the court extended its jurisdiction. In modern law also legal fictions play an important part. Such legal ideas as constructive possession, constructive fraud, and constructive trust show the prevalence of legal fictions in modern law. How do these legal fictions differ from conclusive legal presumptions? Where there is a fiction, it is to be understood that the truth is otherwise but on grounds of policy the court is prepared to apply the legal consequences which would have followed had the fiction been true. Thus constructive trusteeship would mean that admittedly there was no actual trusteeship, but yet the legal consequences of trusteeship are applied to the particular situation. In the case of a conclusive legal presumption, the truth might well be as directed by the presumption. A child born during lawful wedlock while the husband has opportunities of access to his wife is conclusively presumed to be legitimate.¹ The legitimacy of such a child cannot be questioned and the parents cannot adduce evidence to bastardise it. Here the legal consequence of establishing the legitimacy of the child is produced not by means of a fiction but by means of a legal presumption. The inference of legitimacy in such a case might well be true and would be perfectly justified in the large majority of cases.

1. See *Evidence Act*, Sec. 112.

CHAPTER XIX

CIVIL AND CRIMINAL JUSTICE

(1) DISTINCTION BETWEEN CIVIL JUSTICE AND CRIMINAL JUSTICE

Purpose of the proceedings different :—Proceedings in Courts of law generally fall into two categories: Civil and Criminal. The object of a Civil proceeding is to ascertain the legal rights of parties and to afford relief to the injured party by way of damages, specific performance, injunction, repayment or restitution. The object of a Criminal proceeding is to ascertain the guilt of a person accused of an offence and to inflict punishment upon the wrong-doer.

Punishment involves physical suffering to the convicted offender. The question may well be asked why a civilized state should countenance punishments and become the medium for making a human being miserable. Jurists have evolved several theories for giving a convincing answer to this question. These theories are considered below.

(2) THE PURPOSE OF CRIMINAL JUSTICE

(A) RETRIBUTIVE THEORY OF PUNISHMENT

Statement of the theory :—The retributive theory of punishment involves two main conceptions: (1) That punishment is an end in itself and (2) that the primary justification of punishment is to be found in the fact that an offence has been committed and not in any future advantages to be gained by its infliction, whether for society or for the offender as an individual. Immanuel Kant states the theory thus: "Judicial punishment can never serve merely as a means to further another good, whether for the offender himself or for society, but must always be inflicted on him for the sole reason that he has committed a crime.....The law of punishment is a categorical imperative."

Kant gives an extreme application of his theory in the following illustration: Even if a community of citizens dissolves with the consent of every member (e. g. the inhabitants of an island decide to separate and spread all over the world), they must first execute

the last murderer in the prison so that everyone gets what is his due according to his deeds." There need not be any resultant benefit to society according to the retributive theory.

Other Exponents of the Theory :—Among the ancient philosophers Plato was a supporter of the retributive theory. According to him "if justice is the good and the health of the soul as injustice is its disease and shame, chastisement is their remedy.....If the man is happy when he lives in order, then when he is out of it, it is of importance to him to enter it again, and he enters it through chastisement. Every culpa demands an expiation ; the culpa is ugly, it is contrary to justice and order; the expiation is beautiful, because all that is just is beautiful and to suffer for justice is also beautiful." Another noteworthy expounder of the retributive theory was Hegel. According to this German philosopher, wrong being the negation of a right, punishment is the negation of that negation or retribution. Suffering, it is therefore conceived, should thus follow wrong-doing.

Ancient Penology :—The retributive aspect of punishment was accorded exclusive recognition in ancient penology. That all evil should be requited was the principle on which early criminal law was based. It was only in this way that the community could be regarded as purged of the evil. Among the ancient jews even animals which killed human beings were regarded as contaminated and were got rid of for the good of the community. Another interesting feature of early criminal law traceable to the principle of retributive justice is that it concerns itself with visiting the wrong-doer with injuries similar to those which he has inflicted. The penalty is made to fit the offence. "A tooth for a tooth and an eye for an eye" is the maxim on which primitive criminal law proceeds. The governing principle is the appropriateness of the penalty without any reference to the degree of criminality of the offender.

Criticism :—Salmond points out that "*Retribution is in itself not a remedy for the mischief of the offence but an aggravation of it.*"¹ Punishment involves pain and suffering. The infliction of suffering, if unredeemed by some corresponding and compensating good, can only add to the sum total of misery already occasioned by the offence of the criminal. So it cannot be justified if no ulterior good is aimed at and punishment is inflicted merely as an end in itself.

1. *Salmond : Jurisprudence* (10th Ed.) 119.

Stephen's statement of the theory :—According to Sir James Stephen the purpose of punishment is to gratify the desire for vengeance by making the criminal pay with his body. "The criminal law," he says, "stands to the passion of revenge in much the same relation as marriage to the sexual appetite,"¹ Punishment gratifies the feeling of pleasure experienced by individuals at the thought that the criminal has been brought to justice. The desire in question ought to be satisfied to some extent by inflicting punishment to avert the satisfaction of these desires by illegal means in the absence of legal, that is, for avoiding private vengeance.

Salmond's modification :—According to Salmond the retributive purpose of punishment consists in avenging the wrong done by the criminal to society. A crime is not aimed merely at the sufferer. It is an affront to the community itself which should therefore avenge the wrong and see that retribution overtakes the wrongdoer. The purpose of punishment is thus to gratify the desire for vengeance by making the criminal pay with his body. The retributive purpose of punishment is thus the elevation of the moral feelings of the community. The emotion of retributive indignation stirred up by injustice is characteristic of all healthy communities. A noble emotion like righteous indignation deserves to be fostered by the state. Through the criminal justice of the state satisfaction is found for the moral sense of the community.

Criticism :—The retributive theory even in its modified form is defective, for Mr. Justice Holmes points out "This passion of vengeance is not one which we encourage, either private individuals or law-makers. Moreover, it does not cover the whole ground. There are crimes which do not excite it, and we should naturally expect that the more important purpose of punishment would be co-extensive with the whole field of its application."² It is thus clear that retribution is only a subsidiary purpose served by punishment. There are other aspects of punishment to which we shall turn our attention.

(B) PREVENTIVE THEORY OF PUNISHMENT

Object of Preventive Punishment :—The paramount and universally admitted object of Criminal justice is the prevention of crimes.

1. *Stephen : General View of the Criminal Law of England* : 99.

2. *Holmes : Common Law* : p. 42.

As Mr. Justice Holmes points out, "There can be no case in which the law-maker makes certain conduct criminal without his thereby showing a wish and purpose to prevent that conduct. Prevention would accordingly seem to be the chief and only universal purpose of punishment. The law threatens certain pains if you do certain things, intending thereby to give you a new motive for not doing them. If you persist in doing them, it has to inflict the pains in order that its threats may continue to be believed"¹

According to the preventive theory the object of punishment is to deprive the offender either temporarily or permanently, of the power to repeat the offence. The first care of the law is to see that the offender is prevented from continuing to infringe the law with impunity. The offender is incarcerated for a sufficiently long period of time. The object of criminal justice is thereby secured because, during the period of detention, the prisoner is incapacitated from committing further breaches of the law. If the offence is so serious that its repetition cannot be even contemplated, the offender is to be put to death or exiled. Thus the preventive theory of punishment is reduced to the elimination of the culprit by death, imprisonment or deportation.

(C) DETERRENT THEORY

Punishment a warning to others:—The purpose of punishment is regarded by some criminologists as consisting in the deterrent effect which would be produced on would-be criminals. The central purpose of penology is to uphold the law and to make the evil-doer an example and a warning to others that might similarly feel inclined to deviate from the straight path of duty. The deterrent theory of punishment requires that the more hardened a criminal, the severer should be his punishment. The highest punishment of death is justified if the offence is very grave and such a punishment is called for to deter other people from committing similar offences. Punishment, according to this theory, should be so drastic as to strike terror into the hearts of people who may be criminally disposed.

If deterrence alone is treated as the object of punishment, punishment will tend in the direction of cruelty. The more painful a punishment, the more deterrent it is likely to be and since no punishment succeeds in deterring everybody from the commission of the crime,

1. *Holmes : Common Law* ; p. 48.

there is always a ground for making it still more severe in order to increase the number deterred by it. Such an argument naturally opens up a prospect of tortures without limit if the theory of punishment is that punishment should be merely deterrent.

Limiting principle to deterrence :—Beccaria points out: "The more cruel punishments become, the more human minds harden, adjusting themselves, like fluids, to the level of objects around them; and the ever living force of the passions brings it about that, after a hundred years of cruel punishments, the wheel frightens men only just as much as at first did the punishment of prison." Hobhouse also observes: "People are not deterred from murder by the sight of the murderers dangling from a gibbet. On the contrary, what there is in them of lust for blood is tickled and excited, their sensuality or ferocity is aroused and the counteracting impulses, the aversion to bloodshed, the compunction for suffering are arrested." In the eighteenth century England while thieves were hung up publicly as a warning, the spectators were not infrequently plundered by 'deterred' pickpockets. Thus one limiting principle to the deterrent theory arises from the fact that the fear inspired even by the most terrifying of punishments will be blunted by long familiarity with that particular mode of punishment.

Another limiting principle is that the extreme severity of a penal code may make people unwilling to co-operate in carrying out the punishment. In England it was usual for juries to indulge in pious-perjuries for saving petty offenders from the gallows.

When a prisoner was indicted for stealing goods valued at £ 300, the jury found him guilty of larceny of goods to the value of 39 shillings in order that the conviction should not carry with it the penalty of death.¹ Thus if the prescribed penalty be too severe, its deterrent effect would be outweighed by the increased hope of immunity entertained by the malefactor.

(D) REFORMATIVE THEORY

Punishment as a means of social education :—The legitimate purpose of punishment according to the Reformative theory is to reform the character of the wrong-doer so that he will desire to do what is right instead of fearing to do what is wrong. The sociological school headed by Jhering has evolved this theory of punish-

1. *Hall. Theft, Law and Society*, 97.

ment according to which criminal sanctions should be adjusted to the criminal and not the crime. The criminologists hold that the reformation of the individual punished is the only legitimate object of punishment. According to them punishment should be subservient to the education and discipline of the criminal. No criminal, however heinous his offence, may therefore be punished with death. For the same reason it is urged that floggings and other corporal inflictions which degrade and brutalise the criminal should be abolished. In short, the most extreme advocates of reformative methods treat crime as a disease which requires to be cured or remedied rather than as an offence to the punished. The reformative theory regards crime as ■ social anomaly and criminal justice as ■ means of social education.

Individualisation of Penalty :—One fruitful development of the reformative theory is the idea of *Individualisation of penalty*. This means that the punishment has to fit the moral case of the criminal as the drug has to fit the pathological case of the sick man. As Prof. Vinogradoff observes : "The judge stands to the criminal in the position of the doctor who selects his remedy after diagnosing the disease and the resources of the patient's organisation"¹.

Salmond's note of caution :—The reformative element in punishment is no doubt important and should not be overlooked. At the same time it is not wise to magnify it or allow it to assume undue importance. It has to be admitted that there are incorrigible offenders who take to crime instinctively much as an eel takes to water. The extreme advocates of the reformative theory require such specimens to be handled with particular lenience and kindness so that they may not become by the infliction of harsh or degrading punishments more incorrigible. This would be to push the advocacy of the reformative method to the point of absurdity. As Sir John Salmond points out crime cannot be treated purely as a disease. It is ■ 'profitable industry' which would flourish exceedingly unless repressed by the strong arm of the law.

(E) CONTRAST BETWEEN THE PRINCIPLES OF DETERRENCE AND REFORMATION.

(1) **Death Penalty to be abolished under the Reformative theory :—**The death penalty is ■■ admissible mode of punishment so

1. *Vinogradoff: Historical Jurisprudence* p. 59.

far as the deterrent theory is concerned. According to the theory, if a deterrent effect can be produced only by hanging the offender there is no valid objection to resorting to that mode of punishment. As it is not possible to reform a person after cutting off his head, it is obvious that capital punishment is wholly inapplicable for reformatory purposes.

(2) **Corporal chastisement rejected by the Reformatory Theory** :—The reformatory theory wishes to pain criminals as little as possible and improve them as much as possible. The infliction of degrading punishments like flogging is very likely to turn the offender's attention from the wrong he has done to the pain he suffers, so that he only thinks of the latter but not of the former. The disgrace and loss of self-respect thereby entailed are serious obstacles in the path of reform. According to the reformatory theory, therefore, punishments which are calculated to brutalize the criminal are to be discarded. The principle of deterrence, however, points to a different conclusion for such punishments may be precisely the ones that would have the necessary deterrent effect upon potential criminals.

(3) **Habitual Criminals** :—In the treatment of habitual criminals also a difference is perceptible between the deterrent and reformatory theories. Recidivism or persistent reversion to crime on the part of a person punished on previous occasions is an indication that the punishment already inflicted was not sufficiently deterrent. The deterrent theory would therefore require the ruthless application of severer penal discipline to such a case. The reformatory theory, according to Salmond, would have to abandon such a case in despair as the offender is presumably not amenable to the curative treatment of the reformatory process.

(4) **The Deterrent Theory Considers the Crime** :—The Reformatory theory considers the Criminal. The fundamental principle of the deterrent theory is that punishment should be determined by the character of the crime. The reformatory theory realises that hitherto too much attention has been paid to the crime and too little to the criminal. As the Italian Criminologist, Ferri, observes in his *Criminal sociology*: "To the Classical criminologist, the person of the criminal is an entirely secondary element.....he is an animated manikin, on the back of which the Judge places the number of a section of the Penal Code". The corrective is now

supplied by the Reformatory theory. The moral turpitude of an act may not correspond to the magnitude of the external damage caused by an act. So the reformatory theory proposes to probe deep not only into the state of mind of the offender at the time of the act, but also his previous psychological development and the environmental conditions which determined and conditioned his moral character.

(5) Psychological grounds of responsibility ignored by the deterrent theory—The appalling barbarism in the treatment of criminal offenders in the eighteenth century is traceable to the influence of this theory. The indiscriminate application of the death penalty was intended to deter evil-doers. When the reformation of the criminal is not regarded as an object of criminal justice, the psychological grounds of criminality are not taken note of and purely external tests of legal responsibility are adopted. Thus, up to the middle of the nineteenth century, moral insanity or the fact of the prisoner acting under an irresistible influence was not regarded as a legitimate defence or as an extenuating circumstance. In *Reg-v-Haynes*.¹ the accused was charged with the murder of a woman with whom he was on the most friendly terms up to the commission of the offence. It was clearly a case of the prisoner acting under some uncontrollable impulse or moral insanity. Bramwell, B, however, held that the accused had to suffer the highest penalty of the law for, he observed: "If an influence is as powerful as to be termed irresistible, so much more reason is there why we should not withdraw any one of the safeguards tending to counteract it".

Under the influence of the Reformatory Theory English law gradually shifted its point of view and does not now rest content with the purely extrinsic tests of responsibility divorced from psychological considerations. In *R. V. Frayer*² in which the facts are very similar to those in *R. V. Haynes*, Bray, J., said in his charge to the jury: "For the purpose of today I am going to direct you in the way indicated by a very learned judge, Fitz James Stephen: if it is shown that he (the accused) is in such a state of mental disease or natural mental infirmity as to deprive him of the capacity to control his actions I think you ought to find him what the law calls him—'insane'."

1. (1859) 1 *Foster and Finlay's Rep.* 666.

2. (1915) 24 *Cox c. c.* 403.

(F) CONCLUDING REMARKS

Via Media to be sought :—It would appear that for a perfect system of criminal justice we cannot rely exclusively either upon the reformative or the deterrent principle, but should seek a *via media*. Recent legislation has all tended in this direction. While punishment is being mitigated and every opportunity is being offered for the reform of the criminal and his restoration to society, it is also being borne in mind that he is a public nuisance whose activities must be curbed in the manner most likely to protect the public.

Relative importance of the principles of deterrence and reformation :—As between the reformative and deterrent aspects of punishment the English criminal law attaches more importance to the former. Cockburn, C. J., in a memorandum appended to the Report of the Royal Commission, 1863, observes thus: "It is on the assumption that punishment will have the effect of deterring the crime that its infliction can alone be justified; its proper and legitimate purpose being not to avenge crime but to prevent it....Wisdom and humanity, no doubt alike suggest that if, consistently with this primary purpose the reformation of the criminal can be brought about, no means should be omitted by which so desirable an end can be achieved. But this, the subsidiary purpose of penal discipline, should be kept in due subordination to its primary and principal one." This is also the view of Salmond who also insists on the "primary importance of the deterrent element in Criminal justice."

It must be observed that the question is not whether any particular offender should be punished or reformed but whether he should be punished in a way that makes for reformation even though its deterrent effect may be slightly less. The deterrent effect lost by a reformative modification would in the large majority of cases be practically negligible. It is thus possible to reconcile the requirements of the deterrent and reformative theories in actual practice. Punishment should be so definitely and clearly unpleasant that a sensible man would realise in his calm moments that it is not to his material advantage to indulge in crime and incur the risk of punishment. Otherwise the deterrent principle will not be secured. Within these limits punishment should be made as reformatory as possible. Certainty and promptness in punishment are clearly indicated as substitutes for severity increasing the deterrent effect of punishment.

Summary :—(1) Primary Purpose of Punishment:—The foregoing discussion shows that the primary purpose of punishment is the prevention of crime. This is achieved in three ways. Firstly, punishment acts on the body of the offender as to incapacitate him for a repetition of the crime. In the second place, by the punishment of the criminal others are deterred by fear from infringing the penal law. Thirdly, punishment minimises crime by reforming the character of the criminal. In these three ways the dominant object of punishment, namely, the prevention of crime, is achieved. The tendency in modern criminal jurisprudence is to emphasise the reformative aspect of punishment. The prison is tending to become a place of penitence and education. As Prof. D. Liroy observes in his *Philosophy of Right* "Crimes are to be treated as infirmities, and the culpable ones diseased subjects whose fury might be subdued in solitude, if they had been impelled to the evil deed by the violence of their passion; and it should aim at correcting their vicious habits by the aid of labour, if they had come to them through idleness and to enlighten their minds by means of instruction, if ignorance had led them astray. By this means law from being vindictive had become just and from being just it became charitable and it completed the act of punishing by the art of healing"¹.

(2) Subsidiary Purpose:—Punishment has also a subsidiary purpose and that is the elevation of the moral feelings of the community. The emotion of retributive indignation stirred up by injustice is characteristic of all healthy communities. A noble emotion like righteous indignation deserves to be fostered by the state. Through the criminal justice of the state satisfaction is found for the moral sense of the community.

(3) THE MEASURE OF PUNISHMENT

Three elements to be taken into account:—The criminal law fixed the maximum penalties for the various offences and leaves it to criminal courts to award sentences, not exceeding the maximum prescribed by the law, that answer the ends of justice. In awarding punishment to a criminal, a court of law has to advert to three factors: the magnitude of the offence, the motive of the crime and the character of the offender. We shall now consider in some detail the significance of each of these elements in the determination of the appropriate measure of punishment.

(1) Liroy : *Philosophy of Right*, p. 319.

(a) The magnitude of the offence :—The magnitude of an offence depends upon the intensity of the feelings of reprobation of the community towards the act which constitutes the offence. The vehemence with which society denounces a wrongful act is itself dependent upon the malignity of the act and its tendency to injure the community. The greater the perniciousness of the act, the more serious is the offence and the greater is the punishment that should be inflicted to deter people from the crime.

Ordinarily, the law provides a maximum punishment for an offence leaving it to the discretion of the judge to inflict any punishment upto that limit in the particular instance before him. This maximum punishment, whether of fine or imprisonment, provided for by law, represents the sentence to be inflicted in extreme cases only. This fact should be carefully borne in mind. As pointed out by Mr. Justice Mukerji in an old Allahabad case, "It is no ground for ordering a person to pay the maximum fine fixed by law, simply because he can easily pay the fine, if the nature of the offence committed by him is not of the most serious character, having regard to the description of the offence itself." It is easy to see that a miscarriage of justice will be the result if the court fails to advert to the gravity of the offence in determining the measure of punishment.

Motive of the offence :—The object of the Criminal Law is to deter people from committing acts injurious to others. Crimes are committed because the offenders find it to their interest to commit them. Motives of personal interest are generally at the root of every crime. The law strikes at this root if it imposes penalties the severity of which increases with the strength of the motives which lead to crime.

Dr. Johnson is reported to have said in one of his cynical moments that "all men will naturally steal, as all men will naturally commit fornication." The philosopher had gauged human nature only too truly and profoundly when he said that man is vicious by nature. The criminal Law also recognises that man is naturally inclined to crime. It counteracts the natural proclivities which lead to crime by holding out threats of punishment and thereby creating artificially counter motives which make a person recoil from crime. It, therefore, follows that the greater the temptation of man to commit a crime, the severer should be the punishment with which the law should threaten him to make him overcome that temptation.

The principle enunciated above has, however, certain qualifications. Sometimes a crime is committed without any apparent motive. The absence of a sane motive is usually considered by the courts to be one of the indicia of the act being done in some kind of insane impulse. Apart from the clue thus afforded to the mental abnormality of the offender, which, however, will have to be established by further cogent evidence, it should not be supposed that the circumstance of an act being apparently motiveless is a ground for exonerating the accused from criminal liability or awarding a lower punishment than the maximum sentence provided by law.

A second qualification upon the principle is that in some cases extreme temptation should be treated as a mitigating circumstance calling for leniency. In *R.V. Dudley and Stephens*¹ the accused were two seamen who stood charged with the murder of a boy. They had been cast away in a storm on the high seas and had been drifting on the ocean in an open boat. The boy was also one of their company. When they had been seven days without food and water, the two men in order to save themselves, if possible, killed the boy and fed upon him. They were later rescued and charged with the murder of the boy. The murder was made out and the sentence of death was passed. But the capital sentence was commuted to six months' imprisonment in view of the fact that the temptation to which the accused had been exposed was, humanly speaking, irresistible.

(c) **The Character of the offender** :—It is an acknowledged rule of criminal jurisprudence that punishment should be regulated in part by the consideration of the character of the offender. The worse the character or disposition of the offender, the more severe should be his punishment. Evil or antisocial passions are the root causes of crime. Hence the law should punish with a heavy hand every exhibition of depravity and every active manifestation of the baser impulses of man.

One important consequence of the foregoing rule is that habitual offenders should be punished with particular severity. Frequent repetition of crime on the part of a person who has been already punished is indicative of depravity of character which deserves to

(i) 14 Q. B. D. 273,

be ruthlessly repressed by penal discipline. The past record of the prisoner is an element to be taken into consideration in substantially increasing the punishment for a subsequent offence. At the same time it must be remembered that a person cannot be sentenced to an altogether incommensurate punishment for a trivial offence merely because he has been convicted many times before. To give a greatly enhanced punishment for an offence trivial in itself, simply because there have been previous convictions against the offender, would be opposed to the present enlightened ideas of the administration of criminal justice. It must not be forgotten that the nature of the subsequent offence is itself the main element in determining the penalty to be imposed.

A second noteworthy consequence of the rule we have been discussing is the law should be particularly careful in dealing with offenders whose characters have yet to be formed. The reformatory principle should here be borne in mind. On this basis it is that juvenile offenders, that is, offenders under fifteen years of age, are accorded a special treatment in the administration of criminal justice. They are not subject to the usual punishments but are sent to reformatory schools where wholesome influences are brought to bear upon them so that they may become useful members of society.

PART FIVE

JURAL ANALYSIS

In jure omnis definitio periculosa est.

(In law every definition is dangerous.)

CHAPTER XX

RIGHTS AND DUTIES

(1) INTRODUCTORY

Right and Duty :—The basic purpose of social organization is the protection and advancement of human interests. To accomplish this purpose society has to compel individuals to do or forbear from doing particular things i.e., to perform their *duties*. The compulsion is usually put in force by judicial tribunals on the motion of some individual who is interested in having it exercised. When this is the case the individual in question is said to have a legal *right*.

Duguit repudiates the existence of legal rights: The French Jurist, Prof. Duguit, rejects altogether the concept of legal right. According to him "No one has any other right than always to do his duty." Duguit contends that laws are the inevitable consequences of social solidarity and are the expressions of its discipline of the individual members composing the society. Duties are imposed for the benefit of the community as a whole and the power of enforcing them is given not to individuals but to the judicial tribunals of the state. Individuals as such, according to Duguit, have thus no legal rights at all.

Duguit's theory considered: Dr. Jenks in 'The New Jurisprudence' points out that there is no justification for Prof. Duguit's repudiation of the conception of 'legal right.' The enforcement of duties is undoubtedly the function of the state, but the person for whose benefit the duty is enforced may still be regarded as having a legal right. Says Dr. Jenks, "If one individual can in the name of the law and by the agency of the state's officials bring down upon another who has committed a breach of legal duty, the sanction attached to that duty, there exists in the first individual a power to enforce, with the aid of the state, a legal duty and that power the jurist gives the name of 'legal right'¹. Dr. Jenks thus controverts Duguit's view that there can be no legal rights at all. Prof. Allen also has commented adversely on the position taken up by Duguit but as Prof. Laski has pointed out Duguit's denial of subjective right is "terminological rather than actual". Duguit emphasises that it is the duty of man to contribute all he can to the development of social solidarity. He enumerates the conditions upon which the fullness of the contribution depends. These conditions, says Laski, "correspond to the rights of classical jurisprudence."²

1. Jenks : *The New Jurisprudence*. P. 176.

2. Laski : *Duguit's conception of the State in 'Modern Theories of Law'* p. 52.

We shall now proceed to the consideration of the full import of the conception of 'legal right.'

(2) ANALYSIS OF LEGAL RIGHT

(A) DEFINITION OF LEGAL RIGHT

Austin :—According to John Austin "A party has a right when another or others are bound or obliged by law to do or forbear towards or in regard of him." This definition is not quite satisfactory. Mill points out that when a criminal is sentenced to death the jailor is bound by law to hang him. Are we to say, then, following Austin's definition, that a convict has a right to be hanged? It, therefore, appears that the act or forbearance referred to by Austin should be in the interest of the person who can be said to have the right. Further, the person towards whom others are bound to act or forbear should have some controlling power before he can be said to have a legal right.

Jhering :—In the '*Spirit of Roman Law*' Jhering defined Rights as "legally protected interests." The protection of human interests is the chief purpose of social organization. The Law, however, does not protect all such interests. The interests of men conflict with one another and law, being the rule of justice, appraises such interests and selects only some for protection. Jhering regards as legal rights such of these interests as have obtained legal protection. In '*Law as a means to an end*' Jhering points out that one can be said to have a right only when there exists for one some advantage which is protected by the state. That which exists for one may be one's self and the protection of it by the state gives rise to the right of Personality. It may be a thing bearing a certain relation to one's purposes, the protection of the interest in which gives rise to the right of ownership. It may be a person who may exist for one either as personality in its entirety with reciprocal relations that give rise to the rights of Status or in reference to particular acts that give rise to rights in *personam*. Finally that which exists for one may be the state itself and what is protected in such a case is the right of citizenship. In every case the existence of the legal right is dependent upon the circumstance that some human interest has secured the protection of the state.

Salmond :—According to Sir John Salmond, for an interest to be regarded as a legal right, it should obtain not merely legal protec-

tion, but also *recognition*. The law, for instance, punishes cruelty to animals and thus protects to some extent the interests of animals. Animals however, have no legal rights. The right in question belongs really to the organized society, for the interest *recognised* by the law is that of society at large which desires the welfare of its animals. Salmond, therefore, defines a legal right as "an interest recognised and protected by a rule of legal justice."¹

Gray ■ Holland :—Prof. Gray points out that "the right is not the interest itself; it is the means by which the enjoyment of the interest is secured"². If it is my interest to receive ■ hundred rupees from X and if by the law X is bound to pay me, I have a legally protected interest and I have ■ legal right. The legal right, however, is not the payment of the money. It consists in my power to get the money from X. Gray, therefore, defines ■ legal right as "that power which a man has to make a person or persons do or refrain from doing a certain act or certain acts, so far as the power arises from society imposing a legal duty upon a person or persons". Holland also lays emphasis upon the 'power' referred to by Gray. He defines ■ legal right as "a capacity residing in one man of controlling with the assent and assistance of the state the actions of others".³

(B) HOLLAND'S DEFINITION ANALYSED

The definition of 'legal right' adopted by Dr. Holland involves the following results:—

Right distinguished from might :—In the first place, right is to be distinguished from might. Might means the capacity of obliging others to do or forbear in virtue of one's own physical strength i.e., one's own power of inflicting pain or evil. Right is one's capacity of obliging others to do or forbear by means not of one's own strength, but by the strength of a third party. If such third party is God, the right may be characterised as Divine. If such third party is the public acting through opinion the right is moral. If such third party is the state acting through its judicial organs the right is legal. Hence it is that Holland defines ■ legal right as the capacity of ■ person to control the actions of others "with the assent or assistance of the state."

(1) *Salmond: Jurisprudence*, P. 278.

(2) *Gray: Nature and sources of the Law*, P. 18,

(3) *Holland: Elements of Jurisprudence*, P. 79.

It is sometimes said that 'Right is might'. This appears paradoxical, but Austin explains it by saying that it means only "that every right is a creature of might or power. Every right (divine, legal or moral) rests on a relative duty, that is to say on a duty lying on ■ party or parties other than the party in whom the right resides. And manifestly, that relative duty would not be a duty substantially, if the law which affects to impose it were not sustained by might."

Imperfect rights:—The second implication of Dr. Holland's definition is that the person who is said to have the right must be able to obtain by a legal process redress for any violation of his right. Salmond thinks that "legal enforcement does not pertain to the essence of the conception of a right".¹ Prof. Sidgwick considers that "legal redress must be somehow obtainable—otherwise the rule professing to determine the right would not deserve the name of law"². The better view seems to be that expressed in the legal maxim *ubi jus ibi remedium* (where there is a right there is a remedy). In the absence of a remedy the right has to be regarded as an imperfect right.

Right enforceable by its owner:—The third implication of Dr. Holland's definition is that the individual should himself have the power of suing in a court of law any person violating his right. In the words of Prof. Gray "the legal rights of a man are the rights which are exercisable on his motion."³ Sidgwick does not share this view. He says that a destitute pauper has a legal right to relief in England, because the poor-law officials are liable to punishment if they refuse him relief, though the pauper himself cannot sue them.

Right and Duty Correlative:—A further implication of Dr. Holland's definition is that a legal right secures "control" over the actions of others, that is, places others under a legal duty. For every right there must be a corresponding duty imposed on some one else. Does the converse of this proposition hold good? Is there a right corresponding to every duty? As to this there is conflict of juristic opinion which will be considered fully under another topic.

(1) Salmond: *Jurisprudence*. P. 240.

(2) Sidgwick: *Elements of Politics*, P- 32.

(3) Gray: *Nature and Sources of Law*, p. 19.

(C) INGREDIENTS OF RIGHT

Elements of Right :—According to Sir John Salmond a legal right involves five essential elements :

(1) The first ingredient in the conception of a right is the subject of the right—a *person* in whom the right resides, the person of inherence, or the person entitled to the right. A right without ■ subject or a person who owns it is inconceivable. The owner of the right, however, need not be certain or determinate. The subject of the right is uncertain, when, for instance, the owner is a person unborn. It is indeterminate when a right is owned, for instance, by the society at large.

(2) The second ingredient in the concept of a legal right is a person against whom the right avails and may be distinguished as 'the person of incidence'. He is the person bound by the duty and so may be described also as the 'Subject of the duty'.

(3) The third element in the conception of a 'right' is the contentment of the right, the *act or forbearance* which the person in whom the right resides can exact.

(4) The fourth element in the concept of a legal right is the *object* of the right or *thing* over which the right is exercised. Dr. Holland seems to consider that some rights have no objects. Illustrating his point he says : "B is A's servant. Here A is the 'person of inherence,' B is the 'person of incidence', reasonable service is the 'act' to which A is entitled. The object of the right is wanting"¹. Holland is forced to the conclusion that in the illustration given by him there is no 'object' of the right because he considers that the object of a right should be some material thing. Salmond observes that it is not necessary to define the 'object' of a right with such narrowness and that the 'object' of a right is as essential an element in the idea of right as the 'subject' of the right itself. In the illustration given by Dr. Holland the object of the right is the "skill" knowledge, strength, time and so forth of the person bound by the duty"²,

(5) The fifth and last element of a legal right is the '*title*'—the events by which the right has become vested in the owner.

(1) *Holland : Elements of Jurisprudence*, p. 88(

(2) *Salmond : Jurisprudence*, p. 245.

Illustration:—That a right involves all these five elements will be clear from the following illustration. Suppose a testator leaves a gold ring to a legatee. The legatee becomes the subject or owner of the right; the gold ring is the object of the right; the delivery of the ring is the content of the right; the executor is the ‘person’ of incidence’ and the will bequeathing the ring is the ‘title’ of the right.

It is usually said that the terms ‘Person,’ ‘Thing,’ and ‘Act’ are inseparably connected with the term ‘Right.’ Every right involves a threefold relation in which the owner of it stands. It is, first, a right against some ‘person.’ Secondly, it is a right to some ‘Act’ or forbearance of such person. Thirdly, it is, a right over or to some ‘thing’ to which that act or forbearance relates. *Thus the three terms Person, Act, and Thing are inseparably connected with the term ‘Right’.* They will be explained fully in subsequent chapters.

(3) RIGHT DISTINGUISHED FROM COGNATE CONCEPTS

Right and Liberty:—Liberty or privilege denotes the absence of restraint. It is a legal freedom on the part of one person as against another to do a given act or a legal freedom not to do a given act.

Austin’s view:—Austin observes that ‘liberty and right are synonymous. The liberty of acting according to one’s will would be illusory if it were not protected from obstruction. When the law affords such protection, Austin argues, it is in effect conferring a right and so liberty and right are synonymous. In liberty the prominent or leading idea is absence of restraint while protection for the enjoyment of that liberty is the secondary idea. Right, on the other hand, denotes the protection and connotes the absence of restraint.

Criticism of Austin’s View:—It is true that liberty and right are alike benefits conferred upon a person by the law. There is, however, a vital distinction between the two. Austin’s statement that the two terms are synonymous cannot be accepted as correct. The term ‘liberty’ implies that the law does not forbid a person from doing an act and arises out of *the absence of duties* imposed upon him. The term ‘Right’ implies, on the other hand, that the law enjoins on another the duty of doing or forbearing from doing something for the benefit of the person entitled to the right. As succinctly put by Salmond: “Rights are what others are to do for me; liberties are

what I may do for myself"¹. For instance, I am at *liberty* to carry on business as a shop-keeper. The law does not in consequence impose on another any duty in this respect. I cannot, therefore, complain if another opens a rival business next door to me. I have, on the other hand, not merely the liberty but the right of using my trade-mark. If my rival sells goods with a trademark in which I have proprietary rights, I have a legal remedy for he has infringed my *right* to the trade-mark

Correlative of Liberty :—There is no suitable word to express the correlative of liberty. Since the correlative of liberty would be the jural contradictory of Right, Hohfeld has suggested that the word *no right*² may be used as the correlative of liberty.

Right and Power :—A power "is an ability on the part of a person to produce a change in a given legal relation by doing or not doing a given act"³. Thus we speak of a testamentary power, which means the ability to make a will and thereby dispose of one's property. A power of appointment enables a person to dispose of another's property for his own benefit or that of others. A pledger's power of sale or landlord's power of re-entry upon the land when the lessee defaults in payment of rent are also familiar illustrations of legal powers. In a power there is no correlative duty imposed on another. In this respect 'power' differs from 'right' and resembles liberty. The distinction between liberty and power consists in the fact that liberty is what one may do innocently without committing a wrong while power is what one may do effectively and validly.

The correlative of right is duty, while the correlative of 'power' is 'subjection' or liability. The statement that the state has the power to punish a criminal means that the criminal is subject to the exercise of that power.

Power and Immunity :—Exemption from the power of another is an 'immunity.' The correlative of immunity is disability. A foreign sovereign enjoys immunity from legal proceedings in our courts. We are correspondingly under a disability in the matter of instituting legal proceedings against a foreign sovereign.

1. *Salmond: Jurisprudence*, P. 239.

2. This word was coined on the analogy of words like *NOBODY*, *NOTHING* etc.

3. *American Restatement of the Law of Property*

Immunity stands to power in much the same relation ■ liberty to right. Liberty arises from the absence of ■ right in another and the absence of a duty in oneself. Immunity arises from the absence of a power in another and the absence of liability in oneself.

(4) DEFINITION OF DUTY

We have seen that the law protects human interests by compelling individuals to do or forbear from doing particular things. "The acts or forbearances", says Prof. Gray, "which an organised society commands in order to protect legal rights or the legal duties of the persons to whom those commands are directed"¹. Hibbert, however, points out that 'duty' does not mean the 'act' or 'forbearance' which the law commands for these are the objects of the duty. Legal duty may be defined as the predicament of a person whose acts are liable to be controlled by another with the assent and assistance of the State.

(5) DUTY DISTINGUISHED FROM COGNATE CONCEPTS

Duty : Liability ; Disability :—Duty is the predicament of ■ person whose acts are controlled by the state in respect of ■ right vested in another. It is thus the correlative of right. Liability is the position of a person whose legal rights may be altered by the exercise of ■ power by another. It is the correlative of power. Disability is the absence of power in oneself and arises by the the presence of an immunity. All these terms may be explained by means of the following illustration.

Illustration :—A makes an offer to B to sell a house. B has the *power* to accept this offer within a reasonable time. Till the offer is thus accepted, A is under a *liability* to have his offer accepted. Suppose B accepts the offer. Then he has a right to purchase the house and A is under a *duty* to sell it to him. Suppose A conveys the house to B by ■ sale deed. Now B has an immunity from any further exercise by A of a power of sale over that house and on the part of A there is ■ disability to transfer the house since it no longer belongs to him.

1. Gray : *The Nature and Source of the Law*. 18.

CHAPTER XXI

CLASSIFICATION OF DUTIES

(1) POSITIVE AND NEGATIVE DUTIES

Duties may be distinguished as positive and negative. When the law obliges us to *do* an act the duty is called positive, when the law obliges us to *forbear* from doing an act, the duty is called negative.

If A has ■ right to a land, there is a corresponding duty on persons generally not to interfere with A's exclusive use of the land. Such a duty is a negative duty and is extinguished only if the right itself is extinguished.

If A owes a sum of money to B, the latter is under a duty to pay the sum when due. This is a positive duty. In positive duties performance extinguishes both duty and right. As above indicated, ■ negative duty can never be extinguished by fulfilment.

(2) PRIMARY AND SECONDARY DUTIES

Primary duties are those which exist *per se* and independently of any other duty, e.g., a duty to forbear from causing personal injury to another.

A secondary duty is one which has no independent existence but exists only for the enforcement of other duties, e. g., the duty to pay a man damages for the injury already done to his person. It is also called ■ remedial, restitutory or sanctioning duty.

(3) RELATIVE AND ABSOLUTE DUTIES

Austin's view contrasted with Salmond's view :—According to Austin, while every right is relative and has a correlative duty, every duty need not necessarily have ■ correlative right. In Austin's opinion some duties are absolute and do not correlate with any corresponding right. According to Salmond all duties are relative and there can be no absolute duties for there must be a right in another when one is under ■ duty.

Austin's classification:—Relative duties are those to which there is a corresponding right in some person or definite body of persons; as, for e. g. the duty or obligation to pay one's debt to the creditor. Absolute duties are those which have no corresponding or correlative rights. Austin mentions four classes of such duties,

(1) Self-regarding duties, e. g., duty not to commit suicide or become intoxicated.

(2) A duty to indeterminate persons or to the public, e. g. duty not to commit a nuisance.

(3) A duty to one not a human being, e. g., duty towards God or the lower animals.

(4) Duty to the sovereign or state.

State can have no rights: Duties to the State are absolute:—All these four kinds of duties are really reducible to the last head—duties to the state. Class (2) may be regarded as identical with class (4) for when a duty to the public is infringed, it is usually redressed by the sovereign. Classes (1) and (3) when analysed will be found to be indistinguishable from class (2). There can be no such thing as a legal duty to oneself. It no doubt happens that a man's interests are sometimes recognised by the state and protected against himself. Thus when drunkenness is made a crime, a person is under a duty to refrain from drunkenness. The correlative right, however, is not vested in the person himself. Salmond points out that the right is really vested in the community for the interest receiving legal recognition is the interest of society that its members should not be inebriated. Like self-regarding duties, duties towards God and the lower animals also fall under Class (2) as duties towards the public, i. e., the state.

In ultimate analysis, therefore, Austin's view may be summed up thus: The duties of the subjects towards the state are absolute, in other words, "A sovereign Government of one or a sovereign government of a number in its collegiate or sovereign capacity has no legal rights against its own subjects".

Allen supports Austin's view:—This is the view also of Prof. Allen. When the state is not acting in its sovereign capacity, Prof.

(1) *Austin: Jurisprudence*, P. 284.

Allen concedes that it may have rights. "Thus he says : The state, no doubt, may have definite right-interests in the strict sense, similar to those of the individual citizens—rights of a very different kind from the 'right to punish' or 'right to command' or the 'right of sovereignty'. It may enter into contracts and other relationships which give birth to rights and duties in the ordinary legal sense"¹. Where the state imposes duties in virtue of its sovereign character, however, Prof. Allen denies that there are correlative rights in the state. "A state", says Allen, "for example, compels children to go to school, or to be vaccinated, prohibits the sale of certain drugs or alcoholic liquors, or forbids the importation of animals which have not first been quarantined", and asks "where is the corresponding right?"². In particular, according to Prof. Allen, the duties enforced by the criminal law are absolute duties. Hibbert and Markby are also of the view that the duties of the subject towards the state are absolute.

Opposite view held by Salmond :—Salmond and Pollock deny that any duty can be absolute. They do not, therefore, admit that the state can have no legal rights against its subjects.

Austin's Reasoning :—Austin to substantiate his view produced the following argument: No man can confer a right upon himself ; therefore every legal right requires three parties ; namely, a party bearing the right, a party burthened with the duty and a sovereign government setting the law through which the right and the duty are respectively conferred and imposed. Thus that a sovereign should have a legal right would require the existence of another sovereign to confer it. This would be to postulate a super sovereign or derogate from the independence of the state. Therefore, concludes Austin, a sovereign cannot have legal rights.

Austin's view examined :—The flaw in Austin's argument is in the first assertion. It is not impossible that a sovereign could confer a right upon himself. Prof. Grey observes : "The state has an indefinite power to create legal rights for itself but the only legal rights which the state has at any time are those interests which are then protected by the law—that is, by the rules in accordance with which the judicial organs of the state are then acting". An instructive

(1) *Allen : Legal Duties and other essays*, P. 189, 190.

(2) " " " " P. 189.

Illustration is given by Jethrow Brown. In England the right of Parliament to impose a tax is only a moral right for there is no positive law conferring the right on Parliament. So if the state complains that a subject has denied its right to tax, the courts can only reply, "we cannot help you; no legal right of yours has been infringed". On the other hand, the right of the sovereign to receive payment of a tax actually imposed by it is a legal right for it springs from a positive law. Accordingly if the state complains that a particular subject has refused to pay a tax, the courts would consult the Act levying the tax and hold that a legal right has been infringed.

Hibbert's view examined —Hibbert considers that to concede rights to the state is really to confuse might with right. "The distinction between absolute and relative duties," says Hibbert, "is logical and convenient, since it harmonises with the distinction between might and right ; for the state can redress infringement of absolute duties by its own might, whereas persons invested with legal rights do not redress infringements by their own might but by appealing to the sovereign for protection of their rights which is quite a different method of redress."¹ We are not forced to this conclusion, however, if we regard the state as subject to the law. The theory of unlimited sovereignty was rejected by us and we are free to consider law as above the state and conferring upon it rights and imposing upon it duties. If the state is obliged to enforce a remedy *through a court of law*, it does so because it cannot exert might regardless of law. As Pollock observes : "There seems to be no valid reason against ascribing rights to the state in all cases where its officers are enjoined or authorised to take steps for causing the law to be observed and breakers of the law to be punished.

Conclusion :—It is submitted that Austin's view that a state can have no legal rights against the subjects is erroneous. All duties are relative just as all rights are. There can be no absolute duties and Austin's classification of duties into absolute and relative duties is unsound.

1. Hibbert : *Jurisprudence* p. 185.

CHAPTER XXII

CLASSIFICATION OF RIGHTS

(1) PERFECT AND IMPERFECT RIGHTS

Nature of imperfect right:—A perfect right is one in respect of which an action can be successfully brought in a court of law and the decree of the court, if necessary, enforced against a recalcitrant judgment-debtor. An imperfect right is recognized by the law for certain purposes, but is incapable of legal enforcement. In the case of a perfect right, the correlative duty is susceptible of enforcement by the coercive machinery of the state. Ordinarily, a legal right is of this description for "*ought* in the mouth of the law commonly means *must*"¹. When the law imposes a duty it generally compels its performance and the corresponding right would therefore be a perfect right. Exceptionally, imperfect rights are also partially recognized by the law.

Scope of protection accorded to Imperfect Rights :—The scope of the protection accorded to imperfect rights may be explained by taking a typical imperfect right, e.g., a statute-barred debt. In India the holder of a promissory note can sue upon it within three years from the date of its becoming payable. If he does not do so, the bar of limitation sets in. The debt becomes barred by time. Limitation however, does not extinguish the debt. For certain purposes the creditor's rights continue to be recognized, though the statute-barred debt cannot be recovered in a court of law. Firstly, if the debtor pays the money he cannot later sue to recover it as money paid without consideration. Secondly, if the debtor has given some property as security, he cannot, without paying the creditor's dues, recover the things given as security. Thirdly, a fresh promise to pay the debt can be enforced and the barred debt is treated as valid consideration for such fresh promise. Thus, though the remedy in a court of law is lacking, the right itself has not come to an end. It has been reduced to the category of an imperfect right. It enjoys in the several ways described above some measure of protection from the law.

1. *Salmond : Jurisprudence* (10th Ed.) p. 248.

(2) NATURE OF THE RIGHTS OF SUBJECTS AGAINST THE SOVEREIGN

Austin's View : Subjects cannot have rights as Sovereign can have no duties :—Austin is of the view that a state cannot be bound by duties. A law imposing a duty on a sovereign has to be set by some one else to whom the sovereign is subordinate. Such a law cannot be a positive law which by definition is set by the sovereign himself. So no duty of the sovereign towards his subjects can be founded upon positive law. Since Austin concedes that there can be no right in the absence of a correlative duty, Austin concludes that subjects can have no rights against the state.

Nature of legal proceedings against state :—*Petition of Right:* Collock points out that in the practice of civilised nations claims against the state are dealt with by the courts of justice and lead, if the claim is made good, to redress being granted out of public funds. According to Austin the appearance of a sovereign government before a tribunal of its own is no argument in favour of the government having legal rights against its subjects, or being under legal duties. In Austin's time the object of a plaintiff's claim arising out of a contract with the government had to be begged as a grace or favour. The duty of the government could only be enforced by a 'Petition of Right', which was lodged with the Home Secretary. If the petition received the Royal fiat 'let right be done' courts could enquire into the claim of the subject. The rights of the subject against the state, being thus held at the state's good pleasure, Austin concluded that they could not be regarded as rights in the strict sense of that term. The Crown proceedings Act, 1947, has abolished proceedings by way of Petition of Right. Claims may be enforced under that Act against the Crown in the ordinary way as of Right. Austin's argument has thus lost its force.

Salmond's view :—Salmond points out that in truth all legal rights are held at the state's good pleasure. Jethrow Brown says: "We cannot refuse to describe the sovereign's liability as a legal duty on the ground that the sanction is self-imposed, if as a matter of fact the sanction is invariably admitted by the sovereign and applied by the courts." If a sovereign having laid down the law that contracts shall be enforced, enters into contracts with its own subjects, and if these contracts are enforced as a matter of fact by its courts even against

the sovereign then it is impossible to deny that the sovereign is under a legal duty towards its subjects. Salmond considers that the corresponding right of the subject is an *Imperfect Right*, because though judgment can be obtained against the sovereign, it cannot be enforced against the will of the sovereign for it can only be enforced with the sovereign's assistance.

Summary and Conclusion:—We may summarise the opposing arguments as follows :

To say that the sovereign can be bound by a legal duty is to eliminate the idea of compulsion from duty and therefore from law. As Pollock says : " According to the view of the nature of law which regards it as the command of ■ supreme political authority and nothing else, it is difficult to ascribe rights and barely possible to ascribe duties to the state." On the other hand, to deny that the sovereign can be bound by a legal duty is to neglect the idea of regularity in law. Salmond says : " If the judicial proceedings in which the state is a party are properly included within the administration of justice, the principles by which they are governed are true principles of law, in accordance with the definition of law, and the right defined by these legal principles are true legal rights."

The better view seems to be that which recognizes that the state can have rights and is subject to duties. It is true that the rights of the subject against the state as well as the duties of the state towards the subjects are prescribed by the state itself which has the physical power to disregard them and the constitutional power to repudiate them. They are nevertheless in their essential nature true legal rights and legal duties in so far as they are normally capable of enforcement in courts of law. The preponderance of juristic authority is in favour of this view which is shared by Dr. Holland, Sir John Salmond Sir Frederick Pollock, Dr. Jenks and Prof. Jethrow Brown.

(3) POSITIVE AND NEGATIVE RIGHTS

A right is distinguished as positive or negative according to the nature of the correlative duty. The right of ownership is ■ negative right for it imposes on others only the negative duty of non-interference with it. A right to receive compensation, on the other hand, is a positive right for it obliges to ■ positive act the person bound by the duty of paying the compensation.

(4) ORDINARY RIGHTS AND FUNDAMENTAL RIGHTS

The constitution of Bharat has conferred certain rights upon the citizens ¹ which are called Fundamental Rights. Every citizen has a right to freedom of speech and expression to assemble peaceably and without arms, to form associations or unions, to move freely throughout the territory of India, to reside and settle in any part of the territory of India, to acquire, hold and dispose of property, and to practise any profession or to carry on any occupation, trade or calling. ². These rights are some of the rights enumerated as the Fundamental Rights of citizens of Bharat. An ordinary legal right may be impaired, abridged or abrogated by legislative action. Fundamental rights, however, are immune from interference by laws made in the exercise of legislative power. Laws which are repugnant to fundamental rights are void. Fundamental rights can be altered only by constitutional amendment.

(5) ANTECEDENT AND REMEDIAL RIGHTS

Rights may be distinguished as those where the act is due for its own sake and those where it is made due on default of another act. The former are sometimes referred to as rights 'Primary', 'Sanctioned' 'of enjoyment'; the latter are described as rights 'Secondary,' 'Sanctioning', 'of redress'. Holland prefers to distinguish them as rights 'antecedent' and rights 'remedial.'

Antecedent rights are rights which are given for their own sake. The right of the owner of land not to have it trespassed upon is such a right. The right of the owner to get damages from a trespasser belongs, on the other hand, to the category of remedial rights. Remedial rights are given merely in substitution or compensation for rights antecedent, the exercise of which has been impeded, or which has turned out not to be available.

(6) RIGHTS IN PERSONAM AND RIGHTS IN REM

Distinction based upon the incidence of Corresponding duty :—
Rights *In personam* are rights which are available against a definite person or a limited class of persons. They are to be distinguished from rights *In Rem* which avail against persons generally. The

1. Some fundamental rights are applicable even to aliens.
Act. 19, Constitution of Bharat.

former are rights of determinate incidence while the latter are indeterminate or unlimited as regards the person of incidence.

Distinction illustrated:—Dr. Holland explains the distinction between rights in *Rem* and rights in *Personam* by an apt illustration. If a surgeon is practising in a town, he says, there is a negative duty incumbent on all not to prevent him from exercising his calling. There is no general duty not to compete for his practice and so a rival may establish another surgery next door. If, however, the surgeon bought his business from a predecessor who contracted with him not to practice in that town, the predecessor, beyond and above the duties owed by others, would be under a contractual duty of not competing with his successor by the exercise of his profession in that town. The rights of the surgeon against his predecessor are rights in *Personam* and his rights against every one else are rights in *Rem*. The personal right in this illustration is a negative right for it corresponds to the negative duty of his predecessor not to compete with him. Rights 'in personam' are usually positive rights which correspond to positive duties undertaken by determinate persons.

Sources of Rights in Personam :—Rights in *personam* usually arise out of contract. Contract, however, is not the sole source of personal rights. It is possible to have right against a definite individual independently of any agreement with him. For instance one may have the right to receive compensation from a wrong-doer for the breach of a duty imposed on him by law and not by contract. Such a right is a personal right arising independently of contract.

The rights which arise out of status are also rights in *personam*; but they are not of so definite a character as to be reducible to a money value. The rights and duties which arise out of coverture or by membership of a family, for instance, consist often in lifelong courses of conduct and do not always have an economic significance. In this respect they differ from rights in *personam* that arise out of contract.

(7) PROPRIETARY RIGHTS AND PERSONAL RIGHTS

Proprietary rights are those which have an economic significance. Contractual rights, the rights of ownership and of possession, for instance, are proprietary rights. The rights of status, on the other hand, are personal rights for no pecuniary value can be set upon them.

(8) JUS AD REM

A right to a right is ■ *jus ad rem*. In a *Jus ad rem* the person of inherence has the right to have some other right transferred to him. If A agrees to sell his land to B, B acquires ■ right against A to have the land transferred to him. B's right in this case is a *jus ad rem*. Whether the right to be transferred is a right in rem, as in the above illustration, or only a right in personam, the *jus ad rem* is always ■ *right in personam*.

(9) STATUS

Austin's definition:—The term 'status' is explained by Austin ■ follows: "Where a set of rights and duties, capacities and incapacities, specially affecting ■ narrow class of persons, is detached from the bulk of the legal system and placed under a separate head for the convenience of exposition, that set of rights and duties, capacities and incapacities, is called a status"¹.

According to Austin, therefore, status is the aggregate of the entire rights and duties of ■ person considered as ■ member of a class. We may thus speak of the status of ■ trustee, infant or married woman.

Salmond's definition:—Sir John Salmond confines the term 'status' to an individual's *personal* rights and duties as distinct from his proprietary rights and duties which have an economic value.² In this sense we may speak of the status of an infant but not of a trustee.

Allen's view:—Prof. Allen points out that if we exclude proprietary relations from the notion of 'status' what is left may have very little significance³. He defines 'status' as "the condition of belonging to a particular class of persons to whom the law assigns certain peculiar legal capacities and incapacities or both"⁴. By capacity Prof. Allen means the power of acquiring rights and he regards status as depending upon defective capacity, as, for instance, in the case of an infant or a lunatic, or upon peculiar capacity, of which the position of a foreign ambassador affords a good illustration.

1. *Austin : Jurisprudence*, p. 746.

2. *Salmond : Jurisprudence*. p. 264

3. *Allen: Legal Duties and other essays*, p. 32.

4. *Allen : Legal Duties and other essays*. p. 42.

Maine's definition:—Sir Henry Maine understands by 'status' a legal condition in which rights and duties are imposed by operation of law as distinct from ■ condition in which they are acquired by the person's own voluntary act. He further considers that such legal condition must be the result of circumstances beyond the person's control. In this view marriage does not create a status for it results from agreement. Pollock points out that Maine's exclusion from the head of status of "conditions which are the immediate or remote result of agreement" involves "a sensible narrowing of the term 'status' ".¹

Conclusion:—The essential element in the conception of status is that the rights and duties attached to it are determined by law and are independent of the individual's choice. As Anson says: "the essential feature of a status is that the rights and liabilities affecting the class which constitutes each particular status are such as no member of the class can vary by contract." If this condition is satisfied it is immaterial that the status arises from a voluntary act. It is thus permissible to speak of married status or status of bankruptcy. In these cases the law superadds certain capacities and incapacities which are independent of the individual's own choice and so they satisfy the essential condition of the conception of status.

Definition:—'Status' may, therefore be defined as the aggregate of rights and duties which law attaches to a person, as one of a class, which are incapable of being changed at the desire of the persons affected by them.

(10) OBLIGATION

The term obligation is used in two senses.

Proprietary right in personam:—By the term obligation is meant both the right and the corresponding duty in the case of proprietary right *in personam*. If A is indebted to B, it may be said that A owns an *obligation* namely his right to recover payment of the debt. Thus the word obligation represents the legal bond (*vinculum juris*) subsisting between the person having the benefit of the obligation, usually referred to as the creditor, and the person bound by the obligation, otherwise called the debtor.

1. Pollock's Introduction to Maine's Ancient law.

Duty corresponding to rights in personam :—The duty which is the correlative of a proprietary right in *personam* is by itself referred to as an obligation. The duty to pay a debt may be described as an obligation. In this sense the duty not to defame another or not to commit a trespass on another's property is not an obligation for the correlative right is not a right in *personam* but a right in *rem*.

Sources of obligation : Understood as a duty corresponding to a property right in *personam*, the chief sources of obligation are contract and quasi-contract.

(CLASSIFICATION OF RIGHTS ACCORDING TO THE OBJECT)

Classification of Rights according to their object:—With reference to their object, rights may be classified as follows:—

(1) Rights over movable property and rights over immovable property.

(2) Rights over realty or real property and rights over personalty or personal property.

(3) Rights over corporeal property and rights over incorporeal property.

(4) Proprietary rights and personal rights.

(5) Rights in *re propria* (in one's own property) and Rights in *re aliena* (in the property of another).

CHAPTER XXIII

CONTRACT AND QUASI-CONTRACT

(1) DEFINITION OF CONTRACT

Roman law concepts :—A promise enforceable at law is a contract. According to the Roman law a promise *per se* could give rise only to a pact or agreement. In order to have a contract the law had to annex an obligation to the pact. A contract was thus a pact *plus* an obligation. The obligation was the *vinculum Juris*, the legal bond, which joined together the persons in consequence of some voluntary acts prescribed by the law and which served as the *causa* or reason for enforcing the agreement.

An agreement *per se* or a *pactum*, in the absence of some *causa* could be enforced under the Roman Law only if it was (1) *Emptio venditio* (contract of sale), (2) *locatio conductio* (contract for letting and hiring), (3) *Societas* (partnership) or (4) *mandatum* (agency). These bilateral agreements on account of their commercial importance were given binding force *per se*.

English law concept :—Austin has laid down that “the two essentials of contract are: First, a signification by the promising party of his intention to do the acts or observe the forbearances which he promises to do or observe. Secondly, a signification by the promisee that that he expects the promising party to fulfil the proffered promise.”

English law : consideration :—The exchange of promises mentioned by Austin does not by itself give rise to a contract. Either the promise should be reduced to writing, signed and sealed with the seal of the promisor or it should be supported by valuable consideration. Consideration consists in some benefit to the promisor or detriment to the promisee accruing as a result of the promise. A gratuitous promise to pay money, for instance, is not enforceable at law since it involves no benefit to the promisor or detriment to the promisee. In Indian law too consideration is essential to annex a legal obligation to an agreement and make it a contract. Contract may, therefore, be defined as an agreement enforceable at law.

Contract distinguished from conveyance:—Contract is to be distinguished from conveyance. A conveyance is the transfer of ownership or of rights partaking of the nature of ownership (rights in *rem*). A contract on the other hand, creates rights in *personam*. The rights created by a conveyance are available against persons generally while those arising out of a contract avail only against the contracting parties.

(2) CLASSIFICATION OF CONTRACTS

(A) FORMAL AND SIMPLE CONTRACTS

Formal contracts are those that derive their efficacy from the fact of compliance with certain formalities. In English law they are called specialities. The formal requirements prescribed by the English law are that the agreement should be reduced to writing, that it should be signed, sealed and delivered over by the party undertaking the promise to the party entitled to its performance. A simple contract arises by mere consensus of minds, by one party accepting a promise made by the other side. In the English as well as the Indian law such contracts to be valid should be supported by consideration.

(B) VOID AND VOIDABLE CONTRACTS

Void Contract:—A contract without any legal effect is said to be void. The expression 'void contract' is no doubt a contradiction in terms for we have defined contract as an agreement enforceable at law. It is useful, however, in that it indicates an attempt to effectuate a contract which has failed owing to some defect. The defect that vitiates a contract and renders it void may be due to one or more of the following circumstances.

(i) **Want of Contractual capacity:—**One of the parties to a contract may be lacking in contractual capacity. The law denies legal efficacy to a contract entered into by such a party. Thus in Indian law a minor's contract is void.

(ii) **Absence of true consensus:—**If there is a fundamental mistake vitiating the promise or promises that constitute the contract, no legal efficacy can attach to the contract. In *Couturier v. Hastie* the contract was to purchase corn described as supplied from Salonica on board a vessel chartered to England. Two weeks before the

contract was concluded, the cargo had to be discharged at an intermediate port and sold at the best available price as it had become damaged. The parties to the contract were not aware of this fact at the time of the contract. There was thus a mistake as to the very existence of the subject-matter of the contract and so it was held that the contract was void.

(iii) **Illegality** :—The purpose of a contract may be one forbidden by the law and this circumstance again renders the agreement invalid. Thus a contract to murder a person cannot be given effect to.

Voidable contract :—A void or invalid contract then is one wholly destitute of legal effect. A voidable contract is one which is enforceable by law at the option of one or more of the parties to it, but not at the option of the other or others. The contract may give an option to one of the parties to it to avoid it in certain circumstances. The law itself permits a party to avoid a contract when certain vitiating factors are present. Thus if consent to a contract is obtained by undue influence, the law treats it as voidable at the option of the party whose consent had been so obtained.

(C) EXECUTED AND EXECUTORY CONTRACTS

A contract is said to be 'executed' when at the moment of its formation the act or forbearance which serves as consideration for it has already been done or executed. Thus a promise to pay money for services already rendered gives rise to an 'executed' contract. Where the obligation which serves as consideration is to be performed in future, the contract is said to be executory. In an executory contract it is clear that a promise by one party to the contract to do something in the future is the consideration for a like promise by the other party to it.

(D) QUASI-CONTRACT

A quasi-contract is really not a contract at all since it lacks the most essential ingredient of a contract, namely agreement between the parties. In the interest of justice the law sometimes provides a remedy as if there was a contract. Thus if A under a mistake pays money to B which is not owing, justice requires that when the mistake is discovered, B shall refund the money and the law therefore

imposes a duty on B to return it. Obligations such as this, being in the nature of contract, are termed Quasi-contractual.

Quasi-contract distinguished from implied contract:—An implied contract is a true contract while a quasi-contract is raised on the basis of a legal fiction. Implied contract is to be contrasted with express contract. Though terms of the contract have not been expressly agreed to, a tacit agreement may be spelt out from the circumstances. This is an implied contract. If A takes refreshments in a hotel, he has to pay the usual charges. Here contract is implied *in fact*. It is a true contract. Suppose A agrees to build a house for B for a lump payment to be paid on the completion of the construction. If he commits default after doing part of the work, what would be his position? He cannot recover from B on contract because *ex hypothesi* he has committed a breach of that contract. He can recover, however, on the principle of *quantum meruit*, reasonable remuneration for the services actually rendered. Here a contract is implied *in law*. This is a quasi-contract.

(3) CORREAL AND SOLIDARY OBLIGATIONS

Ordinarily only one debtor and one creditor are involved in an obligation. If there is a plurality of creditors, we have a case of co-ownership. When there is a plurality of debtors there is a solidary obligation. When A and B owe a sum of money to C, there is only one debt. C can recover the full amount either from A or from B. Neither A nor B can claim that he is liable only for a half of the debt. Each debtor is thus bound in *solidum* instead of *proparte*, that is for the whole and not for a proportionate part. For this reason such an obligation is solidary obligation.

Solidary obligations are of three kinds:—

(1) **Several:**—Suppose A lends B, C and D Rs. 3,000/—on a promise to repay the amount. If B, C and D execute separate promissory notes, each for Rs. 3,000/- on the understanding that A might enforce any one of them, the obligations of B, C and D have the same subject-matter but their sources are distinct. It is a several solidary obligation. The creditor can have independent causes of action against each of the debtors. The release of one debtor does not necessarily extinguish the obligation of the other debtors. But performance of the obligation by one debtor will discharge the others as well.

(2) Joint (Correal) :—Suppose B, C and D execute a single bond jointly in favour of A for the sum of Rs. 3,000-. Here their obligations have not only one subject-matter, but one source. This is an illustration of a 'joint' solidary obligation. The lender has only one cause of action against the three debtors. All the debtors in such a case would be discharged by anything which discharges any one of them. The release of one of the debtors without the consent of the others operates as release of all.

Joint and Several ;—Suppose B, C and D execute the undertaking to pay the debt jointly and severally. In this case for some purposes they are treated as several. A release given to one debtor does not release the others, Only by performance all would be released. For certain purposes the obligations are also treated as joint. So the creditor can bring one action against all the debtors. Thus a 'joint and several' solidary obligation is treated by law for certain purposes as joint and for certain other purposes as several..

(4) BASIS OF CONTRACTUAL LIABILITY

Why contracts should be enforced :—There are four grounds on which we can justify enforcement of contracts by courts:

(1) Honour Principle: *Pacta sunt Servanda* is regarded as a principle of natural law. That promise as such should be honoured by the promisor is thus a rule derived from the principles of natural law. Honour dictates that one should keep his promise.

(2) Will Principle :—Law should not frustrate the reasonable expectations of people. For this reason it should give effect to the will of parties as manifested in legal transactions.

(3) Bargain Principle :—Where a *quid pro quo* is given, the receiver is bound to reciprocate in the terms on which the *quid* was given. One party having performed his part of the bargain, the other party must be held to the performance of his undertaking.

(4) Injurious Reliance Principle :—When a person has altered his position to his detriment by relying on another's undertaking, that other should make good his undertaking or pay compensation for the detriment he has thus caused.

(5) BASIS OF QUASI-CONTRACT

In quasi-contract relief is granted by the court *as if* there was a contract between the parties, although there was really no agreement either express or tacit. The recognition of quasi-contractual liability in English law is attributed by Salmond to the following causes :

(1) Under the Common law liability was either contractual or delictual. Delictual or tortious liability was always 'a claim to unliquidated damages. A claim for a liquidated sum of money could thus be regarded only as contractual in character. Since all non-delictual claims of this kind could not be traced to contract, a residuary category of quasi-contract had to be recognised.

(2) The remedy on contract under the early common law was by means of the action of assumpsit. In this action the remedy was not extinguished by the death of the defendant. In the delictal actions the maxim *Actio Personalis moritur cum persona* was applied and the death of the wrong-doer put an end to the action. Plaintiffs, therefore, whenever circumstances permitted, preferred, to avail themselves of the contractual remedies. This if B obtained money from A by fraud, A could sue B in tort for damages for deceit. However, he might waive the tort and recover the money obtained by B, relying upon a promise by B, a fictitious promise, to pay back that amount to him. Plaintiffs were permitted to set up such fictitious contracts for the courts, having recognised that the delictal remedies were inferior to the contractual remedies, to do substantial justice between the parties barred the defendants from pleading their own wrongdoing in such cases.

CHAPTER XXIV

OWNERSHIP

(1) AUSTIN'S DEFINITION

Ownership is a comprehensive right :—The right of ownership is the most complete or supreme right that can be exercised over any thing. As Hibbert observes it consists in fact of four rights, viz:— (1) Using the thing (2) Excluding others from using it, (3) Disposing of the thing, and (4) Destroying it.

However, as Markby observes, ownership should not be regarded as an aggregate of rights. It is in fact only a single comprehensive right. "If all the rights over a thing were centred in one person, the person would be the owner of the thing and ownership would express the condition of such a person in regard to that thing. But the innumerable rights over a thing thus centered in the owner are not conceived as separately existing. The owner of land has not one right to walk upon it, and another right to till it. All the various rights which an owner has over a thing are conceived as merged in one general right of ownership..... To use a homely illustration it is no more conceived as an aggregate of distinct rights than a bucket of water is conceived as an aggregate of separate drops".¹

Austin's definition:—Austin brings out the comprehensive nature of ownership when he defines it as a right availing against the world (right in rem) "indefinite in point of user, unrestricted in point of disposition and unlimited in point of duration."

Indefiniteness in point of user :—The first characteristic of ownership is that it is indefinite in point of user since it is impossible to define or sum up exhaustively the wide variety of ways in which the thing owned may be used by the person entitled to its ownership. It may be noted, however, that qualifications have been imposed on the user of property by all mature legal systems. In the first place, every owner must so use the object of ownership as not to injure the right of other persons. No land owner, for instance,

1. Markby : *Jurisprudence*, p. 157; 158.

can accumulate manure on his land in such a way as to cause ■ nuisance to his neighbours. Secondly, officers of justice have a right to enter on the premises of any one in pursuance of a warrant issued by a Court of justice. Thirdly, ownership may be subject to incumbrance in favour of others in which case the power of user of the owner is curtailed by the rights of the encumbrancers.

Dispositive power :—The second characteristic of ownership is that it is unrestricted in point of disposition. The right of alienation is thus regarded by Austin as a necessary incident of ownership. Restrictions are, however, imposed by the law on the power of disposal of an owner. In English Law as also in Indian Law transfers of property made with intent to defeat or delay creditors may be set aside. The owner's power of disposition may be seriously interfered with also by the existence of the rights of incumbrancers. It cannot therefore be said that the true characteristic feature of ownership is the existence of an unrestricted power of disposition. Hindu jurists have explained the significant feature of the concept of ownership as fitness for free disposal. The Viramitrodaya gives the simile of a seed which contains within it the capacity to germinate and be converted into a sprout. Various causes may impede this capacity, but it cannot be said that the capacity to germinate and take the shape of a young plant is not possessed by the seed. Similarly, though an owner's power of dealing with his property may be restrained by various considerations, it cannot be said that ownership does not connote 'fitness' for free disposal.

Perpetual interest :—The third characteristic of ownership is that it is unlimited in point of duration. The right is capable of existing so long as the thing owned exists. So far as the owner is concerned, death naturally divests him of the right. The right however, is not thereby extinguished. Ownership is a perpetual interest which on the death of the owner devolves upon his heir, i.e., the person appointed by law to succeed to the property remaining undisposed of at his death.

(2) SALMOND'S DEFINITION

Ownership : Relation between Person and right :—In its generic sense 'ownership' signifies the relation between the person of inheritance and the right or object of ownership. "If my right is to a term of years in the land of another, I own that right or 'term'. If I have

■ right to the land itself my right is a comprehensive right which exhausts the juridical significance of the thing or object of the right. I am then said to own not this plenary right but the land itself. The right in this case is identified by way of metonymy with the material thing which is its object"¹. It is this supreme right which is called ownership.

Corporeal and Incorporeal Ownership :—Ownership, according to Salmond, is the relation between a person and a right. Every right may be owned. Thus a mortgagee owns his mortgage right and a lessee owns his leasehold right. Such ownership of a right is incorporeal ownership. Ownership of a material object, on the other hand, is corporeal ownership. When it is said that a person owns a house, it means that he owns particular kind of right, namely, the right of ownership in the house. Corporeal ownership can thus always be expressed in terms of incorporeal ownership. Incorporeal ownership, however, cannot always be expressed in terms of corporeal ownership. Thus the ownership of a mortgage right cannot be expressed in terms of corporeal ownership. Where the right owned is the right of ownership, then only it would be possible to express incorporeal ownership in terms of corporeal ownership.

Corporeal ownership defined :—Salmond points out that a person may be the 'owner' although his ownership is not present in its full and normal compass. Some of the component rights of the comprehensive right of ownership may have been detached and granted to others. These particular detached rights are capable of merging once more in the general right of ownership and this happens when they are surrendered back to the owner or otherwise come to an end. The residuary right may not, till the cessation of the detached rights, exhibit all the characteristic features of absolute ownership. It is, however, entitled to be recognised as ownership in the true sense of the term. So Salmond says : "He is the owner of a material object who owns ■ right to the general or residuary uses of it, after the deduction of all special and limited rights of use vested by way of encumbrance in other persons".²

Conclusion :—The right of ownership may therefore be described as the entirety of the powers of use and disposal allowed by the law, limited only by the rights which have been detached from it.

1. *Salmond : Jurisprudence, 10th Ed. P. 268.*

2. ,, ,, 10th Ed. P. 270.

CHAPTER XXV

POSSESSION

(1) THE NATURE OF POSSESSION

Salmond's definition :—"The possession of a material object," says Salmond, "is the continuing exercise of a claim to the exclusive use of it"¹. This definition shows that possession involves, in the first place, a claim of exclusive user. Secondly, this claim should be actually exercised, that is, brought under physical control. In other words, there are two elements which are essential to the concept of possession. One is a physical element and consists in physical control over the thing ; the other is a mental element which consists in the determination to exercise that control. The physical element is called the *corpus possessionis* and the mental element is called the *animus possidendi*.

(A) THE CORPUS OF POSSESSION

Physical prehension unnecessary :—The objective element of possession is called the *corpus* and consists in an exclusive physical control over the thing. Such control may be obtained, for instance, by physical prehension of the thing. It is sometimes supposed that corporal contact as in the case of actual prehension is the physical element involved in the conception of possession. Savigny confuted that theory. A person bound by chains is in physical contact with the chains, but it would be more correct to say that the chains possess him than that he is in possession of them. Savigny expounds his theory of the *corpus* of possession thus : "The physical power of dealing with the subject immediately and of excluding any foreign agency over it.....is the factum which must exist in every acquisition of possessionThis immediate physical power is not necessary to continue the possession, as was required to give rise to it ; and continuing possession depends rather on the constant power of reproducing the original relationship at will. For this reason we do not lose possession by mere absence from the subject, which we have once appropriated to ourselves ; although the physical relation in

1. *Salmond : Jurisprudence*, p. 289

which we now stand to it, would not have sufficed in the first instance to obtain possession''¹.

Savigny's Theory : Power to exclude foreign interference :—According to Savigny, therefore, the *corpus possessionis* consists in the existence of physical power to exclude foreign interference and secure the enjoyment of the thing to oneself. This is the corpus required for the commencement of possession. For the retention of ■ possession once required, however, this physical power need not continue and it is sufficient if there is ability to reproduce that power at will.

Criticism of Savigny's Theory :—Savigny's theory is open to serious criticism. Mr. Lightwood points out that the requirements of ■ power to exclude foreign agency goes too far. 'It is the absence and improbability of foreign interference that constitutes the physical element and not the existence of any power of exclusion''.² As Salmond points out a little child may have absolutely no physical power as against a strong man and may yet possess the money in its hand.

Savigny's view that the *corpus possessionis* is of two kinds according as it relates to the acquisition or the retention of possession is adversely criticised by Salmond and Holmes. Salmond says that there is no reason why possession, which represents a certain relation between ■ person and a thing, should be one thing at its commencement and another in its continuance. Holmes points out that when once a right is acquired there is no ground on which the law need hold that right at an end except in the clear manifestation of some fact inconsistent with its existence. On this principle "it is only a question of tradition or policy whether a cessation of the power to reproduce the original physical relations shall affect the continuance of the rights"³. Possession may continue in law even if the ability to reproduce the physical power of exclusion does not exist.

Salmond's View :—The truth seems to be that actual physical power of exclusion of others is not necessary either for the commencement of possession or for its continuance. The Physical element in possession has a two-fold aspect. Positively, it consists in the

1. Savigny : *Possession in the Civil Law*. (Trans, Kelleher). p. 41, 52.

2. Lightwood : *Possession of Land*, p. 11.

3. Holmes : *Common Law*, p. 236.

exercise of control by the possessor and negatively, in the exclusion of others. The control of the possessor may be secured by many means. Presence near the thing, exclusive knowledge of the situation of the thing or control of the means of access to it, as where it is locked up in a safe of which one has the key, may give rise to the possibility of dealing with the thing as one likes. The exercise of acts of ownership is an unmistakable indication that a person has a control over the thing. In its negative aspect, the *corpus possessionis* indicates the relation between the possessor and other persons. It is the assurance of non-interference by others with the enjoyment of the thing that is of the essence of possession. Two persons cannot be in possession of the same thing at the same time adversely to one another. It is of course possible for two persons such as co-owners to be jointly in possession. In such cases, there is in truth only one possession and the persons in possession enjoy the rights which arise from it. If two persons are in possession each claiming independently of and adversely to the other, neither can acquire possession in law without excluding the other. In this sense, the right of possession represents a claim to the exclusive use of the thing.

The *corpus possessionis* may therefore be described as the present exclusion of others from the use of the thing with the reasonable probability that this will continue.

(B) ANIMUS POSSIDENDI

Savigny's Theory:—The second element in the conception of possession is the mental element, the *animus possidendi*. According to Savigny : "*Animus Possidendi* must be explained by *animus domini* or *animus sibi habendi*, and he only is to be looked on as in valid possession, who deals as owner with the subject of which he has the detention. That is to say, he must contemplate dealing with it practically, just as an owner is accustomed to do by virtue of his right, and consequently, not as one recognising anybody better entitled than himself. Nothing more, however, than this *animus domini* is comprised in the notion of possession, undoubtedly not a moral conviction of being owner."

Illustrations from Roman law :—According to Savigny, the intention requisite for juridical possession is the intention of dealing with it as owner. For this conclusion, Savigny founded himself on Roman

Law in which the tendency was to allow *civilis possessio* only to those who possessed ■ owners. The slave, *filiusfamilias*, agent, borrower for use, the depositary and bailees, for instance who held on behalf of others, had no possession in Roman law. Even in Roman law, however, the *Emphyteuta* or tenant under a perpetual lease, was recognised as having possession although he did not claim as owner. Savigny explained this by the doctrine of derivative possession, that is, by assuming that though the owner retained the *animus domini* he was permitted by the law to transfer his civil possession to the tenant's. This is not ■ satisfactory explanation and the weakness in Savigny's theory which it reveals was seized upon by Jhering to propound ■ different theory of possession.

Jhering's view :—According to Jhering the nature of the *animus possidendi* is altogether immaterial and cannot serve as a test of civil possession. In his view, civil possession depends entirely on the character in which possession is held. Once the physical element of possession is established, civil possession follows unless there is a *causa possessionis* that can exclude it. Civil possession therefore does not depend on the nature of the intention, but upon the *causa possessionis* or character in which the claim to possession is made. The bailee in Roman law was refused the protection of possessory interdicts not because of any defect in the nature of his intention, but because the *causa possessionis* was one which Roman law did not associate with civil possession. The *Emphyteuta*, on the other hand was given the benefit of possessory interdicts because he filled ■ character which the Roman law associated with legal possession.

Criticism of Jhering's View:—Jhering finds in positive legal rules the test of legal possession. This method does not advance the general theory of possession which has to explain why a person in a particular character is allowed the right of possession, but not in another. For instance, ■ theory of possession has to answer the question why it is that ■ thief can claim possession while ■ servant cannot, Jhering's theory, by merely referring to the *causa possessionis* can provide no satisfactory answer to the question.

Salmond's View: True Nature of Animus Possidendi :—That there is a mental element in possession and that this need not go to the height of an intent to appropriate as owner or *animus domini* is clear

from the above discussion. The mental element seems to have two aspects corresponding to the two aspects of the physical element of possession. Positively, it is an intention to exclude foreign interference. The exercise of control and the exclusion of alien control need not be absolute. As Salmond says, a person may possess a land "notwithstanding the fact that some other person or even the public at large possesses ■ right of way over it"¹. What is requisite is that subject to the special rights of others there should be an intention to make exclusive use of the thing. Holmes observes: "If a bailee intends to exclude strangers to the title, it is enough for possession under our law, although he is perfectly ready to give the thing up to its owner at any moment"².

The view which we are here accepting that the *Animus Possidendi* consists in an intention to exclude others (*animus excludendi*), and need not be an intent to appropriate the thing as owner faces one difficulty. In English law, the servant is not regarded as having possession although he has as much the intent to exclude the world at large as, say, a bailee. This is indeed an anomaly and stands out as an exception to the test of legal possession which we have accepted and which has the support of Salmond, Holmes, Pollock and other eminent jurists. Holmes, explains away this exception by suggesting that it arises from incidents of the servant's status. "It is familiar", he observes, "that the status of a servant maintains many marks of the time when he was ■ slave...A slave's possession was his master's possession on the practical ground of the owner's power over him, and from the fact that the slave had no standing before the law. The notion that his personality was merged in that of his master had survived the era of emancipation."³

Conclusion :—We may conclude then that possession at law arises by the manifestation of an intention or the assertion of a claim to appropriate to oneself the exclusive use of a thing in circumstances which afford a guarantee of respect to that claim as shown by other's non-interference with such enjoyment of thing.

(2) IMPORTANCE OF POSSESSION

Possession is evidence of ownership :—Possession confers a good

1. Salmond : Jurisprudence, p. 291.

2. Holmes : Common Law, p. 221.

3. Holmes : Common Law p. 227.

title against all but the rightful owners¹. Lawful possession of land is sufficient evidence of right as owner as against a mere trespasser².

Illustrations from decided cases :—(i) *Akumella Panchayat Board v. Venkata Reddi*, (1945) 2 M.L.J. 176. A public latrine was under the control of the Panchayat Board. In carrying out certain repairs the Board was obstructed by the defendant who had no title to the latrine

Held :—The Board were entitled to a declaration of their possession and an injunction restraining the trespasser from interfering with the work of the Board in carrying out the repairs. The fact that the Board had no legal title to the site on which the latrine stood was immaterial for the defendant was not himself the owner of that site.

(ii) *Hannah v. Peel* (1945) 2 All. E. R. 288=(1945) 1 K. B. 509 :—The plaintiff, while serving in the Royal Artillery, was stationed in a house requisitioned by the Government and he accidentally found a brooch in an upstairs room occupied by him. The brooch was handed over to the police and they, failing in their attempts to discover the rightful owner, delivered it to the defendant who was the owner of the house. The defendant sold the jewel for £66. The suit was brought for recovery of the brooch or its value. The plaintiff claimed the jewel as the finder. The defendant contended that he was entitled to it as the owner of the property on which it was found. The defendant was never in possession of the house and had no knowledge of the brooch until it was brought to his notice :

Held :—(i) The defendant had neither *de facto* control nor the *Animus* of excluding others and as such had no possession ; (ii) The plaintiff was entitled to the brooch or its value since his claim as finder prevailed over all but the rightful owner.

(iii) *Bridges v. Hawkesworth*³ (1851) 21 L. J. Q. B. 57
The plaintiff found a bundle of bank notes on the floor of a shop

1. *Armory v. Delamirie* (1722) 1 Stra. 505—93 E. R. 664.

2. *Ismail Arif v. Md. Ghous* 20 Cal. 834 (P.C.)

3. Discussing this case Salmond says that the shop-keeper (defendant) had not the requisite animus for possession. Sir Frederick Pollock expressed the opinion that corpus possessionis was itself lacking as the shopkeeper had no *defacto* control. Prof. Goodhart and Glanville Williams are of the opinion that this case was wrongly decided. The shopkeeper had a general animus and sufficient control requisite for legal possession as the thing was his shop.

The notes had been accidentally dropped there by a stranger. The party who lost them could not be found :

Held :—(1) The plaintiff as the finder has property in the notes as against every one but the true owner, (2) The defendant had no prior possession which can prevail over the plaintiff's claim.

(iv) *South Staffordshire Water Co., Sharman*, (1896) 2 Q. B. 44—The defendant while cleaning out, under plaintiff's orders a pool of water on their land found two rings. He declined to deliver them to the plaintiffs, but failed to discover the true owner. The action was brought for recovery of the rings :

Held :—The Plaintiffs are entitled to the rings. "Where a person has possession of a house or land, with a manifest intention to exercise control over it and the things which may be upon or in it, then if something is found on that land, whether by an employee of the owner or by a stranger, the presumption is that the possession of that thing is in the owner of the *Locus in Quo*." (Per Lord Russell of Killowen, C. J.)¹.

(v) *Merry v. Green*² The plaintiff purchased a bureau at an auction and got possession of it. Possession of the bureau does not automatically carry with it possession of its contents. In a secret drawer there was money belonging to the vendor. As the plaintiff when he took possession from the vendor had no *animus* in regard to this money, he did not acquire possession of it. That is, the possession of the vendor was continuing in the eye of the law as to the money in the secret drawer. The plaintiff subsequently found the money and appropriated it. In doing so he was depriving the vendor unlawfully and without his consent of possession which in law was still with him and so it was held that the plaintiff had committed the offence of larceny (theft) by appropriating the money.

(3) POSSESSION BOTH A FACT AND A RIGHT

Is Possession a pure fact?—There seems to be some difference of opinion on the question as to whether possession protected by the law

1. It may be observed that possession of land may not necessarily confer possession of all chattels attached to or under the land. To have possession of the chattel the *corpus* and the *animus possidendi* should co-exist. If a chattel is unattached and lying loose upon the land, it is more than doubtful whether possession can be claimed by the owner of the land, without showing that he has the necessary *animus* and *corpus possessionis* with reference to the chattel. See *Hannah v. Peel*, following *Bridges v. Hawkesworth*.

2. (1841) 7 M. & W. 623

is a matter of pure fact or one of law. Sir John Salmond suggests that possession is essentially "a relation of fact and not one of right"¹. In his view possession is the *de facto* counterpart of ownership. It is the factual exercise of a claim while ownership is the legal recognition of one. Thus possession is regarded as an environment of facts that surrounds either a present and existing right of ownership or a claim which is in the process of maturing into ownership.

Mr. Justice Holmes is of the view that possession is not a mere matter of fact but one of right. He points out that "a legal right is nothing but a permission to exercise certain natural powers, and upon certain conditions to obtain protection, restriction, or compensation by the aid of the public force"². A right is attached by the law to a set of facts which it defines. It is given to the person in whose case those special facts are present. In the case of possession as in the case of ownership, the law singles out a group of facts and a person gets a corresponding right when those facts are present with reference to him. The only difference between possession and ownership, Holmes points out, consists in this: the term 'possession' denotes the group of facts and connotes the legal consequences while 'ownership' denotes the consequences and connotes the facts. But for this difference in accentuating one element or the other, possession is as much a matter of right as ownership is.

That possession is a matter of right and not merely of fact should be clear from the circumstance that rules are laid down by the law as in other cases of right-of ownership, for instance,—which prescribe the mode in which it may be gained or lost. It is noteworthy, however, that law recognises as possession all that is such in fact in the absence of any special reason to the contrary. Factual possession is generally requisite for civil possession. Thus it rather appears that possession is both a fact and a right. Sir Frederick Pollock, shares this view³.

(4) DETENTION OR NATURALIS POSSESSIO

Detentio and possession:—When a person is in such a position to a thing that he can deal with it to the exclusion of others, one element of possession, namely, the *corpus possessionis*, is present. This *corpus*

1. Salmond : *Jurisprudence*, p 370.

2. Holmes : *Common Law*, p. 214

3. Pollock & Wright : *Possession in the Common Law*, p. 10.

is physical possession, *possessio naturalis*, custodia or detentio. If the element of *animus possidendi* is added to this corpus, it becomes *civilis possessio* or juristic possession. The servant in English law is in the position of a person having detentio merely with respect to the master's goods entrusted to him.

The slave, *filius familias*, agent, borrower for use and the depositary had no intention to hold except on behalf of the owner. They were mere physical channels through whom the owner possessed. Under the Roman law they had detentio only, the corpus but not the animus.

The exact nature of the animus required for juristic possession has been explained Supra.¹

(5) POSSESSORY REMEDIES

Distinguished from Proprietary remedies :—The right of possession as such receives protection from the law. Under Sec. 9 of the Indian Specific Relief Act, a person dispossessed from immovable property can sue for restoration of possession. If he brings the suit within 6 months from date of dispossession he can succeed on mere proof of his prior possession. The defendant cannot resist the suit by setting up a title in himself. The question of ownership or title to the property is irrelevant in such a suit. Even if the defendant has a better title, he must first surrender possession to the plaintiff and then bring his own suit based upon title. This proprietary remedy of the defendant is thus distinct from the possessory remedy afforded to the plaintiff.

Why Possession as such is protected :—Why possession should be entitled to the protection of the law even when it is divorced from the right of ownership may require some explanation.

There are three reasons for the protection of possession :

(a) Protection of possession aids the criminal law by preserving the peace. According to Savigny the protection of possession is a branch of protection to the person. Possession in this view is protected in order to obviate unlawful acts of violence against the persons in possession. Interference with possession inevitably leads to a disturbance of the peace. Order is best secured by protecting a possessor and leaving the true owner to seek his remedy in a court of

1. See page . 192

law. Mr. Justice Holmes observes : "Law must found itself on actual facts. It is quite enough therefore, for the law, that man, by an instinct which he shares with the domestic dog and of which the seal gives the most striking example, will not allow himself to be dispossessed, either by force or by fraud, of which he holds, without trying to get it back again."¹ To obviate the violence resulting from this, possession is protected by the law.

(b) Possession is protected as part of the law of Tort. The law protects possession not only from disturbance by force but from disturbance by fraud. This protection is thus afforded as part of the law of tort. According to the philosophical school of jurists possession is protected because a man by taking possession of an object has brought it within the sphere of his will. The freedom of the will is the essence of personality and has to be protected so long as it does not conflict with the universal will, that is, the state. Since possession involves an extension of personality over the object, it is protected by the law. Just as a person's reputation is protected against defamatory attacks, so too is his possession protected for he has projected his personality over the object of possession.

(c) Possession is protected also as part of the law of property. Cairns observes : "Possession was originally protected to aid the law of crime and tort ; it came at length to be protected in order to aid the law of property"². In the early stages of the development of the Law of Property when proof of title was difficult, it was felt to be unjust to cast on a person whose possession was disturbed the burden of proving a flawless title. The law therefore presumed that the possessor was the owner until a superior title was shown to exist in some one else. In this way possession as such came to be protected by the law.

Salmond suggests that distinct possessory remedies are no longer required. The punishments of the criminal law and the sanctions of the law of tort are sufficient to prevent the evils of violent self-help. An owner who has dispossessed a trespasser being amenable to such sanctions, need not be required to deliver possession to the trespasser and recover it back in an independent proprietary action. As for assistance rendered to the law of property, the modern law of evidence

1. *Holmes : The Common Law*, p. 213.

2. *Cairns : The Social Sciences*, p. 65.

can adjust the burden of proof suitably and avoid the duplication of proprietary and possessory remedies. While these considerations urged by Salmond are entitled to great weight, it has to be concluded that expediency requires possession ■■ such to be protected. In Indian law a compromise between proprietary and possessory remedies has been struck. If the dispossessed owner brings his suit promptly within 6 months, he is allowed to succeed merely on proof of possession even against the true owner. If he brings his suit beyond that period, he would be non-suited if the defendant proves a superior title in himself.

CHAPTER XXV.A

KINDS OF OWNERSHIP

Basis of Classification:—In its normal manifestation ownership is exclusive, immediate, unconditional and beneficial. These requirements are fulfilled when one is solely entitled in *praesenti* to some estate without the liability of holding it for the benefit of another or of losing it on the happening of any specified event. Frequently, one or other of these requirements is not satisfied. Thus an interest instead of being exclusively owned may be held along with another or others. It is then said to be in *Concurrent* or *co-ownership*. Again, ownership may not be immediate or in *praesenti* and may take effect in possession and enjoyment only after the expiration of a prior interest. Thus *A* may have a fee simple after a life estate in favour of *B*. *A*'s ownership is then said to be *future ownership*. It is also possible for ownership to be qualified by a condition on the happening of which it shifts or passes to another person. Thus *A* may hold an interest in fee simple which on his marriage is to pass to *B*. *A*'s ownership is then said to be *conditional ownership* for it is held subject to a provision in favour of another. Lastly, ownership may be destitute of beneficial enjoyment, the interest being held in trust for the benefit of another. This may be designated *trust ownership*. We shall now examine the various kinds of ownership referred to above.

(1) CO-OWNERSHIP

Joint Tenancy and Tenancy in common:—There are two important forms of ownership in English law—joint tenancy and tenancy in common.

A joint tenancy arises where a grant is made to several persons without indicating that they are to take separate interests. Each tenant then acquires an identical interest in the whole and every part of the land. The possession of the joint tenants is said to be *per mie et per tout*, of every parcel and of the whole, since they take by moieties as well as by entireties. No joint tenant can claim to be exclusively entitled to any distinct parcel, for, as Blackstone explains "each co-tenant has the entire possession as well of every

parcel as of the whole". Each owner has physical control over every part of the property, but in respect of his co-owner's share such control is exercised, not on behalf of himself but as representative of his co-owner. On the death of one of the joint owners his interest is extinguished and the survivors continue as joint tenants. This incident of survivorship is called the *jus accrescendi* and is the most significant feature of joint ownership.

Tenancy in common or common ownership arises where a grant is made in terms which indicate that the grantees are to take the property in distinct shares. The co-owners are interested each in a part but not in the whole. They are said to hold the property *per mie* but not *per tout*. The incident of survivorship is absent in the case of common ownership. On the death of one tenant in common, his interest passes not to the survivors but to his own heir or devisee. For this reason equity favours the construction of grant as a tenancy in common.

Co-ownership : Hindu joint family:—Common ownership is familiar to Hindu law. Joint ownership of the English law type is rather foreign to Hindu law and so the presumption usually made, where the grantees are Hindus, is that they hold in common. The joint ownership that is familiar to Hindu law is the special kind of which the joint holding by the members of an undivided Mitakshara joint family is the type. The distinguishing feature of a Mitakshara coparcenary is the right of survivorship possessed by its members. Therein it resembles the joint tenancy of English law. A Mitakshara coparcenary is, however, liable to be enlarged by the birth of male issue to the coparceners. Invested with a right by birth the male issue also become coparceners. This feature is absent in the joint ownership of English law.

(2) FUTURE OWNERSHIP

Incorporeal right :—The distinguishing feature of future ownership is that it is incorporeal in character. It is unaccompanied with possession of the property. The English common law recognised two future estates,—the reversion and the remainder. If an owner conveyed property for a lesser estate than the interest held by him therein, the grantee got what was called a particular estate, being only a part or *particula* of the parent estate. The residue of interest remaining in the owner was called a reversion. Thus if A, the owner

of property, grants a life estate to B, he still retains some interest though it is deferred in regard to possession. The interest retained by A is then called a *Reversion*. If at the time of granting the particular estate, another estate was given to another person to take effect in possession upon the determination of the particular estate, it was called a *Remainder*. Thus if a grant is made to A for life and thereafter to B, the estate of B is said to be a remainder. In English law future estates were abolished at law by the Law of Property legislation of 1925. They can therefore exist only in equity.

Vested and contingent:— Future ownership is either vested or contingent. Ownership is vested when the title is perfect and the only obstacle to its taking effect in possession is the existence of the particular estate. A reversion is thus always vested for as soon as the particular estate is out of the way, it can immediately take effect in possession. A remainder, on the other hand, need not necessarily be vested. The title itself may become perfect only on the fulfilment of some condition precedent and till then the future ownership is not vested even in interest. Suppose a grant is to A for life, remainder to A's son B when he attains 21. The remainder in favour of B does not necessarily take effect in possession on the termination of the particular estate by A's death. B has to fulfil a condition as to the attainment of a particular age before he can claim possession. The interest of B is dependent on the fulfilment of a condition precedent. It is said to be contingent and becomes vested as soon as the condition is fulfilled.

Spes successionis:—A *spes suecessionis* or chance of succession is the expectancy of an heir to succeed to the property of a relation on the latter's death. There is a legal maxim which says *Nemo est heres viventis* (no one while alive can have an heir). So during the life-time of the owner, the person who would become his heir on his death can only have an expectancy or *spes successionis*. This kind of interest cannot be transferred at law. Also it is not a heritable interest. A contingent interest is not heritable but is transferable. That is the distinction between a *spes successionis* and a contingent interest.

(3) CONDITIONAL OWNERSHIP

An interest in property may be subjected to conditions by force of which it may be made to determine without attaining its regular

limit of duration. The interest is then said to be in conditional ownership. Thus property may be given to A for life, but if he marries X, then to B for life. The marriage of A to X is the condition which divests the interest of A and vests it in B. The ownership of A is said to be conditional or determinable. By the fulfilment of the condition subsequent the ownership of A determines. The interest of B in the illustration in question is contingent. It takes effect in interest only on the fulfilment of the condition which, with reference to B, is a condition precedent. The fulfilment of a condition precedent operates to vest an estate which has not already vested. By the fulfilment of a condition subsequent, an estate already vested is divested. Conditional ownership is vested ownership with a condition subsequent attached to it on which its continuance depends.

(4) TRUST OWNERSHIP

Trust and Beneficial ownership:—In England trust ownership arose out of the practice of conveying property to a person to the use of another. When property was conveyed to A to the use of B, A had the legal ownership and was called the feoffee to uses. B, the *cestui que use* had originally no remedy to enforce the use since the Courts of Common Law refused to recognise uses. His right to the property was regarded as a moral right for which there was no legal sanction. A remedy was found for the enforcement of his rights by the invention of the Chancery writ of *subpoena*. By this writ the feoffee to uses was required to perform the 'use' or trust under pain of imprisonment. The Chancellor did not interfere with the legal ownership which the feoffee to uses or trustee had at common law, but when it was asserted or sought to be asserted in derogation of the rights of the *cestui que use* or beneficiary, he intervened with an injunction to restrain the breach of trust. In this way the beneficiary's rights came to be fully protected. He could take the profit of the land and compel the trustee to dispose of the estate according to his directions. He had all the advantages of ownership and was recognised in Chancery as the true owner enjoying in equity the same estate in the land as he would have had at law if the feoffee to uses executed the estate by conveying it to him. The beneficiary's interest being protected in equity was an equitable ownership. The ownership of the trustee, recognised both by the common law Courts and the Equity

courts, was destitute of beneficial enjoyment and came to be called trust ownership.

Legal and Equitable ownership distinguished:—In English Law the ownership of the beneficiary is necessarily an equitable ownership as it finds recognition only in equity. The ownership of the trustee however, need not always be *legal* ownership. The interest or equitable ownership of the beneficiary may be settled upon trust when the trustee himself can hold only an equitable ownership. Trust ownership may be either legal ownership, that is ownership recognised by the rules of the common law, or equitable ownership recognised by the rule of equity divergent from the Common Law. Trust ownership cannot therefore be equated with legal ownership and so the distinction between legal and equitable ownership is not identical with the distinction between trust and beneficial ownership.

Purpose of Trusts:—The chief purpose of trusteeship is “to protect the rights and interests of persons who for any reason are unable effectively to protect them for themselves.”¹ The protection of trusteeship is required by four classes of persons. In the first place, unborn persons may become entitled to property contingently on their birth and till they are born and are able to deal with the property, the machinery of trust is useful for safeguarding the property. Secondly, persons under some disability, such as lunacy or infancy, which makes them incompetent to manage the property require trustees for its administration till the disability ceases. Thirdly, where large bodies of persons are interested in the same property, the complexity of co-ownership may be eliminated by vesting the property in trustees. Trusteeship becomes absolutely essential when property is given to a fluctuating body of persons, e.g., the inhabitants of a locality. Unincorporated associations such as clubs and trade unions are enabled by means of trusteeship to become beneficiaries. Fourthly, trusteeship safeguards the interests of persons who may have conflicting or competing interests in the same property. Thus property may be vested in trustees for distribution among the creditors of a person.

(5) DUPLICATE OWNERSHIP

Where a right is owned by more persons than one at a time we

(1) *Salmond : Jurisprudence* p. 276.

have a case of duplicate ownership. Co-ownership obviously gives rise to duplicate ownership. Trust ownership, again, is a case of duplicate ownership, for the trust property is owned by two persons at the same time—the trustee and the beneficiary. This circumstance distinguishes trusteeship from agency. As between an agent and his principal, the property is vested solely in the latter, but in trusteeship it is vested in the trustee who is the nominal owner of the property ■ also in the beneficiary for whom the trustee administers the property. Future ownership may also give rise to a case of duplicate ownership. In future ownership the property may be vested in possession as well as in interest in one person and in interest only in another.

CHAPTER XXVI

KINDS OF POSSESSION

(1) ADVERSE POSSESSION

The possession of property by a person is adverse to every other person having or claiming to have a right to the possession of that property by virtue of a different title. Possession to be adverse must be an invasion of the ownership of another. Further it should be actual, exclusive, and adequate in continuity, and in publicity. It should be *nec vie, nec clam, nec precario*. That is, acts of possession must be exercised without violence, without stealth and without permission. When these conditions are present possession is regarded as adverse. The conception of adverse possession has great importance in law for when it is had for the period required by the positive rules of law, it extinguishes the title of the true owner and creates a title in the adverse possessor.

(2) QUASI-POSSESSION

Possession of incorporeal rights:—Whatever may be owned may be possessed and whatever may be possessed may be owned. Material objects may of course be both owned and possessed. In the case of objects which are not material, ownership can be postulated. Thus copyrights, patents, trademarks, etc., though they are incorporeal, may be owned. Whether such incorporeal property may be possessed is a more difficult question. For instance, can a fishery be possessed? If some one pollutes the stream, can an action of trespass be brought against him, alleging interference with possession? Roman jurists used the term quasi-possession in regard to the possession of ■ mere *jus*. English law also treats incorporeal rights as capable of possession provided there is a power of excluding others from the enjoyment of the right. The *de facto* use and enjoyment of the content of a right amounts to possession. Thus while rights over incorporeal objects cannot strictly speaking be possessed, their exercise with the necessary animus is described as quasi-possession. The exercise of a right of way may be described as quasi-possession of the right of way.

(3) MEDiate AND IMMEDIATE POSSESSION

When possession is a relation which exists directly between the possessor and the thing possessed, it is said to be immediate. Where it exists through the intervention of another person it is said to be mediate. Where one individual has detention of a thing at the will of another, so that legal possession is not attributed to the detainer, but to the person who controls him, mediate possession arises in the controller, the other having detention merely. Thus the master has mediate possession while the servant has detention. According to Salmond possession through a tenant and possession through a pledgee or a bailee are also cases of mediate possession. Keeton expresses the view that the landlord, the pledger and the bailor have no possession at all, but a right to recover possession at some future date.¹ That this view is not tenable would be clear from the following example.

Suppose A is in possession of *Blackacre* as a trespasser. He can become its owner by adverse possession for 12 years. At the end of 5 years he leases the land to B and put him in possession. 7 years elapse after the date of the lease. Then A can claim to have become the owner by adverse possession for 12 years though for part of the period, viz. 7 years, the property was actually in the occupation of his tenant B. This can only be because A has mediate possession of the property. Mediate possession in this case avails against every one except the lessee who has immediate possession and is entitled to remain in possession even as against the landlord so long as the leasehold interest lasts.

(4) DUPLICATE POSSESSION

Possession being a right to exclusive use, it is not possible for two persons to have independent and adverse claims to possession of the same thing at the same time. The possession of a thing by one person would be compatible with the possession of it by another only when the two claims are not mutually adverse. Claims to possession which admit of concurrent realisation give rise to duplicate possession.

Illustrations :—(1) *Compossessio*: The possession of co-owners is a case of duplicate possession and is usually called '*Compossessio*.'

1. Keeton : *The Elementary principles of Jurisprudence*, p. 144.

(2) *Corporeal and Incorporeal Possession* :—Corporeal and incorporeal possession again may co-exist in respect of the same object. Thus one may possess a land while another has a right of way over it. This is a second illustration of duplicate possession.

(3) *Mediate and Immediate Possession* :—The most important case of duplicate possession is what Solmond designates as mediate and immediate possession. Possession may be held on account of some one else. The person for whom possession is held has mediate possession of property while the person holding the thing directly has immediate possession. Examples of duplicate possession of this character are furnished by the possession of landlord and tenant, bailor and bailee, and master and servant. The tenant, the bailee and the servant have, each of them, immediate possession. They recognise the right to possession of the landlord, the bailor and the master respectively after their own interests or claims, if any, have come to an end. The landlord and the bailor have mediate possession which avails against all the world save the immediate possessor. The servant can claim no interest of his own and holds solely for his master. The possession of the master is mediate possession but avails even against the immediate possessor.

CHAPTER XXVII

RIGHTS IN RE ALIENA

Distinguished from Right in re propria :—A right in *re aliena* is ■ right which one has in the property owned by another. It is also called an encumbrance and may be defined as a right which limits or derogates from some more general right belonging to some other person in respect of the same subject-matter. There are four kinds of encumbrances, *viz.*, (1) Easements; (2) Securities; (3) Leases and (4) Trusts.

(1) EASEMENTS OR SERVITUDES

Definition :—An easement (called a Servitude in Roman law) is a right attached to one particular piece of land which enables the owner of that land either to use the land of another person in a particular manner or to restrict its use by that other person to ■ particular extent. The land to which the easement is annexed is called the dominant tenement and the land over which the right is exercised is called the servient tenement.

A positive easement enables the owner of the dominant tenement to do something upon the servient tenement. A right of way is ■ positive easement. A negative easement confers a right to restrain the commission of some acts on the servient tenement. The easement of light is ■ negative easement for it enables its owner to restrain the servient owner from erecting any construction that would materially obstruct the passage of light coming to the building of the owner of the easement.

License Distinguished :—A license is ■ right, not being an easement to do or continue to do upon the immovable property of another, with the permission of its owner, something which would be an unlawful act but for such permission. The following features of distinction between a license and an easement may be noted;

(1) A license is invariably ■ right to *do or continue to do* some positive act on the immovable property of another. It is not, unlike an easement, a right to prevent an owner of immovable property

from doing something on his land. Thus while an easement is both Positive and negative in character, ■ license is always positive.

(2) A license is, a personal right and creates no more than a personal obligation between the licensor and the licensee. An easement, on the other hand, is a right *in rem* available against all :the world.

(3) A license is not appurtenant to any land while an easement is always attached to a dominant tenement for the beneficial enjoyment of which it is intended.

(4) Being ■ personal right a license is not assignable except in certain circumstances, but an easement passes with the dominant heritage.

(5) While a license is generally revocable at the will of the grantor, an easement cannot be revoked at the will of the servient owner.

(2) SECURITIES

A security is ■ right to have recourse to a thing as ■ means of securing performance of some obligation. The obligation in question is generally the repayment of money which has been lent to the owner of the thing. Securities are of three kinds :

(a) **Pledge** :—This is a security which appertains to movables. In this, ownership is with the debtor but possession is given to the creditor. The creditor has the power of sale for realising the security.

(b) **Lien** :—This is a right which entitles the holder of the security to retain possession of the thing until the obligation is performed.

(c) **Mortgage** :—In a mortgage some right over the thing is given to the holder of the security for the purpose of ensuring the fulfilment of the primary obligation. For instance, the right of selling the property or of calling for a transfer of ownership of the property to himself may be given to the mortgagee as security for the debt payable to him.

Lien distinguished :—A mortgage differs from ■ lien in some respects :

(1) A lien is in itself merely a security and is vested in the lienee absolutely. In ■ mortgage the right that is given may be ownership. The right, therefore, is vested in the mortgagee not *absolutely* but only *conditionally* as ■ security.

(2) The right transferred in a mortgage is inherently capable of surviving the debt. If ownership is transferred as security, the discharge of the debt may not *per se* extinguish the security. The ownership will have to be conveyed back to the mortgagor in such a case. In a lien, the right of the lienor automatically determines with the debt. There is no independent right that can survive the debt.

Ideal Security:—“The best type of security”, says Salmond, “is that which combines the most efficient protection of the debtor with the least interference with the rights of the debtor.” In a security some right over a thing is transferred to the holder of the security for the purpose of ensuring or facilitating the fulfilment of a primary obligation. It is thus an encumbrance. The rights of the owner of the security *vis a vis* the person who has created the encumbrance will depend upon the nature of the right thus transferred. In an ideal security the right transferred would be such that while the creditor’s rights are fully safeguarded only the minimum of interference with the debtor’s right to the encumbered property is permitted. A brief survey of the history of the Roman security would serve to illustrate this point.

(3) HISTORY OF THE ROMAN MORTGAGE

Fiducia:—The earliest type of security known to the Romans was the ‘fiducia’. It was effected by a transfer of ownership from the debtor to the creditor, accompanied by a condition for its retransfer upon due payment of the debt. The drawbacks of this type of security are obvious. The debtor was deprived of both ownership and possession and was very much at the creditor’s mercy. The creditor had dominium and not a *jus in re aliena* and could dispose of the property itself so that the debtor might not always be able to get back the property.

Pignus:—A second type of security which was an improvement upon the ‘fiducia’ is seen in the ‘Pignus’. In Pignus the ownership of the object remained with the debtor but its possession was transferred to the creditor. The creditor could not except by special arrangement called *antichresis*, make use of the thing which was thus in his custody. Nor had he a power of sale without express agreement. These circumstances show that though this type of security

was clearly advantageous to the debtor who could retain his ownership, it was unfavourable to the creditor since there was no adequate remedy for the realisation of the debt.

Hypotheca :—The Romans ultimately developed the 'Hypotheca' which could adequately protect the interests of the creditor without causing undue hardship to the debtor. The ownership of the thing as well as its possession remained with the debtor who, however, agreed that he would hold the property as security for the discharge of the debt. The creditor had a right of sale for the realisation of his debt. He acquired a *Jus in re aliena* which could be asserted against third parties by an action *in rem*. Thus, the hypotheca have the requisite protection to the creditor, while at the same time enabling the debtor to retain possession as well as ownership and the right of dealing with his interest in any manner he liked subject to the rights already created therein in favour of the creditor. It was thus an ideal security from the point of view of the debtor as well as of the creditor.

CHAPTER XXVIII

TITLE

(1) NATURE OF TITLE.

Definition :—By title is meant the set of facts or events by reason of which a right has become the subject-matter of ownership.

Title :Derivative and original :—The creation of a right for the first time gives rise to an *original* title. The first person who takes possession of a *nullius* (thing which has no owner; e.g. fish in the sea) becomes its owner. A derivative title arises when the right of one person is transferred to another, e.g. by gift or by sale. Such derivative titles may be acquired voluntarily or involuntarily.

Acquisition of title :—A title is acquired voluntarily when the acquisition is pursuant to an *act of the party*. When A makes a gift of his property in favour of B or bequeaths his property by will to B, the transfer of title takes place in pursuance of the express wishes of A. There is an *act in the law*, the gift in the one case and the testament in the other, by virtue of which the law takes away the right from A and confers it on B.

(2) MODES OF ACQUIRING POSSESSION.

(a) Taking :—Possession may be acquired by taking the thing with the requisite *animus*. Such taking may be wrongful as when a thief steals a watch.

(b) Delivery :—Delivery is the voluntary relinquishment of possession by one person in favour of another. It is said to be actual when the union of *corpus* and *animus* in the possessor is brought about for the first time as a result of the delivery by the previous possessor. It is said to be constructive when there is no physical dealing with the thing, but by a mere change in *animus* possession is secured.

Actual delivery :—When A sells and hands over a book to B, or lends it to B, there is an actual delivery of it. The delivery of the

key to a warehouse is actual delivery of the goods contained in it for the key gives access to the goods.

Constructive delivery :—Constructive delivery may be illustrated by the following examples :

(1) A lends a watch to B and then asks him to keep it as a present. Here the mediate possession of A is transferred to B who is already the immediate possessor.

(2) A sells a house to B and continues in possession agreeing to vacate the house whenever required by B. Here B has secured mediate possession by constructive delivery. The same result would of course be achieved if he takes actual delivery and then puts back A in possession as tenant at will.

(3) A sells to B land which is in the possession of a tenant C. The tenant attorns to B, that is, acknowledges B as his landlord. Here B has secured mediate possession by constructive delivery. This kind of constructive delivery is known as attornment.

(3) MODES OF ACQUIRING OWNERSHIP.

Of the modes of acquisition of ownership the following are the more important ;

(A) OCCUPATIO

On the principle of *occupatio*, a person may become the owner of a *res nullius*, i.e., a thing not previously belonging to any one, by taking possession of it. At the present day things without owners are rare. Animals *farae naturae* belong to this category. In English Law the effect of possession in conferring proprietary rights is illustrated by the doctrine of 'General Occupant.' If a property was given to A for the life-time of B, and A predeceased B, the first person (called the general occupant) who took possession of the property on the death of A could hold the property for the remainder of the life-time of B. The doctrine of 'general occupant' was abolished by the Statute of Frauds.

(B) LONG POSSESSION OR PRESCRIPTION.

Kinds of Prescription :—Lapse of time under conditions determined by law as to duration operates in the following ways :

(1) **Positive Prescription :—**Lapse of time confers a title on the person who has enjoyed the right for the prescriptive period. Thus

the enjoyment of a right of way over another's land for 20 years confers ■ prescriptive right of way on the person who has enjoyed the right for the prescriptive period. This is an illustration of acquisitive or positive prescription.

(2) **Limitation**:—It may restrain the holder of ■ right from enforcing his right by recourse to law. Thus in India the holder of a promissory note payable on demand cannot enforce it if three years have elapsed from the date when money became payable thereunder. This kind of operation of lapse of time upon rights is known as *negative imperfect prescription* or the limitation of actions.

(3) **Extinctive prescription**:—Lapse of time may not only bar the remedy but extinguish the right itself. This is *perfect negative prescription*. In limitation of actions the barred right subsists for certain purposes. For instance, a barred debt, though it cannot be used upon, can serve as consideration for a promissory note. In perfect negative prescription the right itself is extinguished.

(4) **Translative prescription**:—Lapse of time may not only bar the remedy and extinguish the right of the original holder, whose right is dissociated from possession, but even *transfer* that right to the opposing claimant who is in enjoyment of the right. Thus a trespasser who is in possession of A's land for 12 years secures a title to the land by prescription while A loses his title to that property. There is ■ coincidence of the divestitive as well as the vestitive operation of lapse of time upon rights. This kind of prescription is called *translative*, acquisitive or positive prescription for the right of the late owner is thereby transferred to the adverse possessor.

Theoretic justification of prescription:—Negative prescription destroys ■ right or the means of enforcing it in a court of law. Positive prescription results in the acquisition of a right and is usually accompanied by the extinction of the right of its previous owner. The theoretic justification for this is to be found in the following consideration :

(a) **Public Policy**:—Justinian gave the reason for prescription as "the inexpediency of following ownership to be long unascertained." To secure the quiet and repose of the community, it is necessary that title to property and matters of right in general should not be in ■ state of doubt and suspense. By directing that the possession of

property or enjoyment of a right for a definite length of time confers a good title uncertainty in regard to ownership is avoided.

(b) **Injurious effects of time removed** :—By limitation or negative prescription controversies are limited to a fixed period. Lapse of time raises difficulties in regard to the proof of the case of the defendant. Death of parties and witnesses, the loss or destruction of documents and the fading of memory in the course of time, render necessary the fixation of a time limit for instituting legal actions. Lord Phunkett, Lord Chancellor of Ireland, observed : “Time holds in one hand a scythe and an hour-glass in the other. The scythe mows down the evidence of our rights; the hour glass measures the period which renders that evidence superfluous.” The law of limitation and prescription repairs the injuries caused by time and ensures justice by supplying the deficiency of proof.

(3) **Occasional injustice justified on the theory of laches**:—By the application of the law of prescription and limitation, it is true that sometimes usurpers acquire property and debtors escape payment of their debt. Occasional injustice like this may be produced by the law of prescription. Honest parties may thus suffer loss. This individual mischief is justified on the ground that a party who does not assert his claim with promptitude has no right to require the aid of the state in enforcing it. The law acts upon the maxim. *Vigilantibus, non dormientibus jura subveniunt*. (The law assists the vigilant, not those who sleep over their rights.)

(C) AGREEMENT

By agreement between parties the ownership of one may be transferred to another. The transfer is called a sale when it is for a price and a gift when it is made without any consideration.

Under Sec. 8. of the Transfer of Property Act, if a different intention is not expressed, a transfer of property passes to the transferee all the interest which the transferor is then capable of passing in the property and in the legal incidents thereof. Such incidents include when the property is land the easements annexed thereto, the rents and profits thereof accruing after the transfer and all things attached to the earth.

(D) TESTAMENTARY SUCCESSION AND INHERITANCE

Ownership is transferred by ■ testamentary instrument or will when it is disposed of after the death of the owner according to his wishes. It is transferred, in the absence of ■ will, by force of the law, when it is said to devolve by inheritance.

(E) INVOLUNTARY ACQUISITION OF THE TITLE

Illustrations:—Acquisition of title is said to be involuntary when it takes place not by an act in the law but by an *act of the law*. The creation, extinction or transfer of a right is here brought about by law itself regardless of the wishes of the party whose rights are affected. Thus heirship involves an involuntary transfer of rights. The heir is the person appointed by the law to succeed to the property of the deceased owner. Likewise, when there is an insolvency, the property of the insolvent vests in the official receiver by operation of law. The sale of property by court in execution of its decree and acquisition of title by the court-auction-purchaser is also an illustration of the transfer of title by an act of the law.

CHAPTER XXIX

JURISTIC PERSONALITY

(1) DEFINITION OF 'PERSON'

Definitions of Salmond and Gray :—"A person", says Salmond "is any being whom the the law regards as capable of rights or duties". Gray defines a person as "an entity to which rights and duties may be attributed".

The bearer of a right is regarded as a person though he is not subject to duties. Thus lunatics and foreign sovereigns who possess rights, but at the same time are free from duties are regarded as persons.

The subject of ■ duty can be regarded as a person even if he is in a state of rightlessness. The slave, in Roman law, was in such a position. He had no rights but was always subject to certain duties imposed by the criminal law.

We may, therefore, define a person for the purpose of jurisprudence as any entity (not necessarily a human being) to which rights or duties may be attributed. The definition of Salmond is preferable to that of Gray.

(2) LEGAL STATUS OF ANIMALS.

Ancient Penology :—Among the ancients animals were regarded as the subjects of legal duty. Under the ancient jewish law, if an ox gored a human being to death, it was to be stoned and by way of further punishment its flesh was not to be eaten. In the Middle Ages animals used to be tried with solemn dignity by the courts. At Stelvio in the Tyrol a colony of field mice stood their trial in 1519 for wilfully damaging a farmer's pastures. They were ably defended by counsel who argued that the countless holes made by his clients helped to aerate the soil and thus benefited the farmer. The Court found the mice guilty of undermining the efforts of labour and sentenced the entitre colony to be banished to ■ new camping ground. The court took care to guarantee the mice a safe conduct pass. Dogs, ■ats, hawks and other traditional enemies were debarred from feasting on them

en-route. As a final stroke of compassion pregnant mice were given a fortnight's grace before being escorted to their new territory. In France a hog that had been found guilty of crime by the courts of France was pardoned by the king because of its youth.¹

Modern Law:—Modern systems of law, however, give no countenance to the theory that animals can be subject to legal duties. For the wrongs of animals no doubt the owners are made liable. This does not involve, however, the recognition of any legal duty on the part of the animal and the consequent imposition of a form of vicarious liability on its master. The liability of the master is either a species of absolute liability resting on expediency and public policy or is attributable to his failure to take necessary precautions to ensure that his cattle do not cause injury to the person or property of others.

Not only are animals free from legal duties, but are also destitute of legal rights. The law forbids cruelty to animals and imposes an obligation on people not to be cruel to animals. This does not mean that the correlative right is vested in the animal. Prof. Gray observes that if the obligation not to be cruel to animals is held to correlate with a right vested in the animal, then a duty not to deface public monuments would correlate with a right vested in the monument. The right in both cases is vested in the public at large.

Can animals have proprietary rights? A trust for the maintenance of horses, dogs or other animals useful to men is generally upheld as a charitable trust. A charitable trust is one intended for the benefit of the public and promoting some object beneficial to mankind.² When a trust is in favour only of some specified favourite animals of the author of the trust, it cannot be regarded as a public charity. In *Re Dean, Cooper-Dean-v-Stevens*³ a testator charged his property with the payment of an annual sum to trustees for the maintenance of his horses and hounds. North, J., observed that the trustees might, if they pleased, expend the money in the manner indicated by the testator. They could not be found fault with if they did so. But even if they did not apply the money thus it would not be regarded as a breach of trust. In such a case the unexpended money would have to

(1) *Sontherland : Principles of Criminology*, 44.

(2) *See Transfer of Property Act, Sec. 18.*

(3) (1889) 41 Ch. D. 551

be handed over to the testator's legal representatives. It is thus clear that the trust for a non-human beneficiary creates in favour of such beneficiary no beneficial proprietary interest in the subject-matter of the trust. Animals have thus neither rights nor duties and are, therefore, incapable of sustaining a legal personality.

(3) LEGAL STATUS OF UNBORN CHILDREN.

Contingent Proprietary Rights :—Paton observes that "the child in the womb is not a legal personality and can have no rights."¹ This view is based upon the fact that the child should be born alive and should be completely extruded from the mother's body before it can have any benefits under the law. It is submitted that this view is not tenable. Not only children in utero, but even unborn children in the sense of *children not yet conceived* have legal personality. This is because such unborn persons can be the subjects of rights, rights which are contingent upon their birth. The ownership of contingent rights is sufficient to sustain legal personality. The ownership becomes vested ownership when the child is born.

A child *en ventre sa mere* is regarded as already born and treated as a person *in esse* for many purposes. Thus a direct gift may be made to the child in the womb. In Hindu Law if a partition is made without allotting a share to a child in the womb who would have been entitled to a share had it been in existence on the date of the partition, the partition is liable to be set aside. Thus proprietary rights of children in utero are fully recognised by the law. Under the criminal law injury to a child in the womb is a punishable offence. Causing death to a child in the womb, and causing abortion or miscarriage are made punishable by the Indian Penal Code.² Thus children in the womb have rights protected by the law and have legal personality.

Even before conception takes place, unborn children have personality. Rights can be created in favour of unborn persons either through the medium of trust or by vesting the property in some person *in esse* till the unborn comes into existence. These proprietary rights are contingent upon the birth of the person in whose favour the rights are created. The creation of proprietary rights in favour

(1) Paton : *Jurisprudence*, p. 252.

(2) See Ss 312 ; 313 ; 316.

of unborn persons is governed by what is known as the Rule against perpetuity. This rule imposes a time limit within which the interest should become vested. Its object is to prevent property being withdrawn for too long a period from the possibility of alienation by their owners being unborn persons. The contingent rights of unborn persons become vested on birth or at the end of such period, not exceeding that prescribed by the Rule against perpetuity, as may be fixed by the person granting the rights to the unborn donees.

Since unborn human beings can have rights, though such rights are contingent upon their birth, they must be recognised as persons.

(4) LEGAL STATUS OF DECEASED HUMAN BEINGS

Dead men are not legal persons for they have neither duties nor rights. That they are immune from duties is clear. Whether they are destitute of rights is a question requiring explanation. In the first place, the reputation of dead men is to some extent protected by the law. Does it mean that the dead have legal personality? Stephen, J., no doubt declared in *R-v-Ensor*¹ that to "libel the dead is not an offence known to our law; the dead have no rights and can suffer no wrongs". Libellous attacks against the dead may however render the defamer liable to an action at the instance of the relations of the dead. This is allowed when the libel in question is also an oblique attack upon the descendants. Thus the right recognised is not that of the dead to have their reputation protected, but that of their living descendants who would suffer by an attack upon their deceased ancestor.

Secondly, the testamentary dispositions of the dead are carried out by the law. Does it mean that the dead have a right to have their wills enforced by courts? Here again the right involved is only that of the surviving legatees and not that of the dead. It is one of the requirements of a valid will that it should contain a disposition of property that can take effect. If the testator directs that his property should not be used at all by any one or that it should be converted into cash for being thrown into the sea, the testamentary wishes would be ignored. In *Draivia sundaram v. Subramania*,² a will directing that the testator's property should be used for building and maintaining a tomb was

(1) (1887) 37 T. L. R. 366

(2) (1945) Mad, 217—(1945) 1 M. L. J. 210.

held to be unenforceable. It is thus clear that the rights recognised in the case of a testament are only those of living legatees and not those of the deceased testator.

Thirdly, the law secures decent burial for the dead. This, however, does not mean that the dead have a right to burial. The interest recognised and protected by the law is only that of society which would be adversely affected by the putrefaction of the corpse.

Thus approached from any point of view, the conclusion reached is that the dead have neither rights nor duties. The dead have thus no legal personality.

(5) KINDS OF PERSONS

Persons are of two kinds: Natural and legal.

Natural Persons:—A natural person is a living human being. Not all human beings necessarily possess legal personality. In early systems of law slaves were regarded as mere chattels to whom neither duties nor rights could be ascribed. In such systems of law slaves were destitute of legal personality.

Legal Persons —A legal person is any subject-matter to which the law attributes legal personality. In modern times normally legal personality is granted to all human beings living within the territory of the State. Legal personality being an artificial creation of the law, may be conferred on entities other than individual human beings. Salmond observes that "the law in creating legal persons, always does so by personifying some real thing.....Although all legal personality involves personification, the converse is not true." The soundness of this statement requires a detailed examination.

Personification does not necessarily imply legal personality:—

(i) **Club** :—Personification is extensively used in ordinary speech. Thus we speak of a club to signify compendiously the members thereof. Thereby we personify as a single entity the group of individuals who are the members of the club. The club, however, may be an unincorporated association which is not recognised as a legal person.

(ii) **Firm** :—To take another illustration. a group of partners in a commercial undertaking may be referred to collectively as a firm. If the firm is a legal person, it means that there is one entity recognised by the law as capable of representing the group of partners, an entity which is wholly distinct from the individual members of the

group. In law, however, the firm has no existence apart from the members constituting it. The firm cannot be either a creditor or a debtor of the members of the firm and strictly speaking a suit cannot be instituted in the firm's name but only in the name of all the partners composing the firm. Thus the firm is only a 'convenient symbol' or 'short hand' form for collectively designating all the partners. The personification here in question conduces to simplicity of thought and speech but does not correspond to any entity having a legal personality.

Legal personality involves personification:—Hibbert divides legal persons into three kinds of entities.

(a) Certain things which are deemed to be invested with rights and subject to duties are regarded as 'persons.' The legal person is created by personifying some real thing. Such a 'person' has a real existence and it is the personality alone that is fictitious.

An example of this is the *Praedium Dominans* and the *Praedium Servians* of Roman law. The *Praedium Dominans* was a piece of land the ownership of which gave the party certain rights over another piece called the *Praedium Servians* and whoever was the owner for the time being of the latter was subject to these rights. By a fiction of law it was assumed that the rights were vested in the *Praedium Dominans* and that duties were imposed on the *Praedium Servians* and these were regarded as legal persons.

English law is not familiar with this kind of legal person.

(b) A collection of rights and duties may be vested with legal personality. An example of this is afforded by the *Hereditas Jacens* of Roman law. This was the legal *Persona* of a deceased until the heir had entered upon his inheritance and consists of all the rights and duties of the deceased which were deemed to be existing as though he ~~was~~ still alive.

It may be observed that neither the English law nor the Indian law recognises the fiction of the *Hereditas Jacens*. The property of a deceased person vests *ipso facto* in a party called the legal personal representative who is liable for the debts of the deceased only to the extent of the property.

(c) The most important juristic person is a corporation. This kind of legal person is recognised both in England and in India.

A corporation is an artificial person enjoying in law the capacity of holding property. Corporations are of two kinds: Corporations aggregate and Corporations sole.

A corporation aggregate is a body of human beings united for the purpose of forwarding certain of their interests. The best example of it is a limited liability company. Such a company is formed by a number of persons who by becoming shareholders of the company contribute or promise to contribute money for the furtherance of a common object and limit their liability to the amount of their contribution paid or promised. Indeed, one of the special uses of incorporation is to enable traders to trade with limited liability. The legal entity, namely the company, is formed by the personification of the shareholders.

A corporation may also consist of a single person in which case it is called a *Corporation Sole*. A series of persons are in this case personified and regarded by the law as a legal person. Examples of this kind are the Crown, the office of Bishop or Archbishop, a parson or vicar, the post-master-general, the public trustee etc.

It will be observed that personification is involved in every one of the three kinds of entities which have legal personality ascribed to them.

(6) PURPOSES OF INCORPORATION

“There is probably nothing,” observes Salmond, which the law can do by the aid of the conception of incorporation, which it could not do without it.”¹ This statement of Salmond should be received with caution and accepted with reservations. The most important purpose of incorporation at the present day is to enable traders to embark upon commercial ventures with limited liability. This is rendered possible by the incorporation of the limited liability company. Such a company is formed by a number of persons becoming shareholders and registering the company under the Companies Act. By becoming a shareholder, the member contributes or promises to contribute a stated amount of money for the furtherance of the common objects of the company. His liability is limited to this contribution. If the venture of the company ends in disaster, he will not be called upon to meet the claims of the creditors of the company. The assets of the company, including the share capital

(1) *Salmond: Jurisprudence 10th Ed, 336.*

promised but still remaining unpaid, would alone be answerable for the claims of the company's creditors. In this way the shareholders are able to trade with limited liability. This is one of the chief purposes of incorporation and it cannot be served by any other device known to the law.

There are other purposes served by incorporation which are, however, capable of being served by means of the device of trusteeship. The fiction of corporate personality is introduced for the purpose of bestowing the character and features of individuality on a collective and changing body of men. Incorporation assimilates the complex form of collective ownership to the simpler form of individual ownership. Where a large number of persons become the owners of property, there is bound to be great difficulty in the management and disposition of the property and in taking legal proceedings by or against the body of co-owners. To avoid this difficulty the law creates a fictitious legal person to which it attributes the rights and duties that would ordinarily attach to the beneficiaries. This fictitious person is endowed by law with the capacity of dealing with the property as the representative of the co-owners and of figuring in legal proceedings on behalf of its members.

This purpose of incorporation may be served also by means of trusteeship. The trustees can represent the body of co-owners for purposes of suing and being sued. Here again it must be observed that incorporation secures the object in view much better than trusteeship. A corporation is a continuous entity endowed with a capacity for perpetual duration. Trustees, however, being mortal, have to change from time to time. The element of permanence is thus absent in trusteeship. Incorporation secures not only the element of unity but that of permanence as well. For this reason, though by means of the device of trusteeship the law can secure all the objects which are realised by means of incorporation, still incorporation secures those objects more conveniently and must be regarded as an indispensable legal concept of abiding value.

(7) NATURE OF CORPORATE PERSONALITY

(A) INTRODUCTORY

Fiction Theory :—There are two theories as to the true nature of corporate personality. According to one view which is widely held by English jurists, the personality of the corporation is a fiction

of the law introduced for the purpose of bestowing the character and properties of individuality on a collective and changing body of men. The conception of incorporation is regarded as a fictitious extension of personality resorted to for the purpose of facilitating dealings with property owned by a large body of natural persons.

Realist Theory :—According to the second theory, of which the German jurist Dr. Gierke is the leading exponent, a corporation is a real person, its reality being psychic. While the fiction theory denies that corporate personality has any existence beyond what the state chooses to give it, the realist theory holds that a corporation is a representation of psychical realities which the law recognises rather than creates.

Difference between the Theories :—It might be supposed that the difference in the two points of view is merely verbal, but it is not so. Prof. Gray observes : "whether the corporation is a fictitious entity or whether, according to Gierke's theory, it is a real entity with a real will, seems to be a matter of no practical importance or interest. On each theory the duties imposed by the state are the same and the persons on whose actual wills those duties are enforced are the same."¹ Glanville Williams, Editor of the 10th Edition of Salmond's Jurisprudence, also observes that the controversy has no legal significance².

It is difficult to agree with these learned jurists on this point. That the two theories are capable of leading to radically different legal conclusions is clear from the following illustration given by Prof. Geldart. "Take the case of a society", he says, "neither incorporated nor bound by a charitable trust, but formed and existing for a common object. The purpose ceases or the members refuse to carry it out. Can they dissolve and divide the society's property among themselves? Yes, if we can see nothing but co-ownership and contract. No, if we can see here a body which is more than the sum of its members, with a life which should be preserved, if possible, from self-destruction, with property which in the worst case will be *bona vacantia* and such available for the public benefit"³. It would not be right to belittle the significance of these competing theories of corporate personality.

(1) Gray : *Nature and sources of the Law*, p. 55.

(2) Salmond : *Jurisprudence* (10th Ed.) 330.

(3) Geldart : *Legal Personality L.Q.R.* (1911) p. 90 at 102.

We shall now examine the two theories in some detail.

(B) THE FICTION THEORY

View of Savigny, Salmond and Gray:—According to Savigny : “The essential quality of all corporations consists in this, that the subject of the right does not exist in the individual members thereof (not even in all the members taken collectively) but in the ideal whole : a particular, but specially important result whereof is, that by the change of an individual member, indeed, even of all the members, the essence and unity of a corporation is not affected”¹. Sir John Salmond also comes to the conclusion that a corporation is so far distinct from its members that it is capable of surviving even the last of them. Thus he points out that a company incorporated by Act of Parliament can be dissolved only as provided therein or by another Act of Parliament. The fact that all the members of the company have ceased to exist leaving no representatives behind willing to take their place leaves the continued existence of the company itself unaffected. The being which can thus survive all its members, Salmond concludes, is only fictitious creature of the law.

A group of persons who have common interests secure by the act of incorporation the power of protecting their interests through an organisation known as the corporation which is set in motion by the will of certain individuals as provided for in the instrument of incorporation. As Prof. Gray says, “By fiction an abstract entity called the corporation is created and by a second fiction the wills of individuals are attributed to it”².

Sir Frederick Pollock in a learned essay on the ‘*Fiction Theory of Corporations*’³ has shown that the English common law has given no countenance to the fiction theory of corporate personality. The fact, however, remains that in English law neither collective liabilities nor collective powers can be incurred or claimed by a body of individuals unless it can satisfy the requirements of incorporation. Unincorporated bodies are not treated as legal persons in English law. Before a body of persons can have rights and duties in their corporate character they have to produce an authoritative document having the approval of the state, which defines the purpose for which it exists, the means by

(1) *Savigny : Systems of Modern Roman Law, (Rattigan's Trans).* p. 181.

(2) *Gray : Nature and Sources of the Law* p. 55.

(3) *Pollock : Essays in the Law. (Sub voce).*

which its will is manifested, the extent of the liability undertaken by each of its members and so forth. An ordinary social club, for instance, though it plays a large part in English life, has no recognition as a legal person in its collective capacity. The club can neither sue nor be sued in its own name unless it has formally submitted to an act of incorporation as prescribed by the law. It is therefore clear that English law favours the rigid theory that corporate personality is a mere pretence of the law and entirely dependent upon the fiat of the state. Dr. Jenks observes : "There would, it may be suggested, be little practical difficulty in the working out of a more liberal view of the collective person than that adopted hitherto by English law."¹ As matters stand at present, however, the classical fiction theory thus holds the field in England though, as will presently be seen, it is being seriously assailed by the exponents of the realist theory.

(C) REALIST THEORY

Realist theory :—The realist theory of corporate personality has the support of Gierke, Beseler, Lasson, Bluntschli, Zitelmann, Miraglia and others on the Continent and has found favour in England with eminent jurists like Pollock, Maitland, Geldart, and Jethrow Brown.

Psychological research has shown that the association of many persons produces a will distinguishable from that of the separate members of the group. From the interpenetration of many wills there arises a single group or corporate will which is distinct from the totality of the wills of its members and which inspires the action taken by the group just as an individual will of a man inspires the man's own action. As Dicey observed : "When a body of twenty, or two thousand, or two hundred thousand men bind themselves together to act in a particular way for some common purpose, they create a bond which by no fiction of law, but by the very nature of things differs from the individuals of whom it is constituted." If individual consciousness and individual will invests an individual with personality, group consciousness and group will invest the group with a personality as real as is the corresponding personality of the individual. Miraglia observes : "The corporation is in a certain aspect more real than the individuals, because it possesses, greater complexity of parts and represents a higher form of evolution"¹.

(1) *Jenks : The New Jurisprudence*, p. 156.

(2) *Miraglia: Comparative Legal Philosophy*, p. 371.

When it is said that corporate personality is a reality it is not suggested that a corporation is an actual person. All that is meant is that a corporation is a representation of psychical realities that exist independently of the fiat of the state and are recognised rather than created by it. The conception of group personality belongs thus to the world not of material but of psychical realities. Prof. Gray denies the reality of a collective will. He observes : "A collective will is a figment. To get rid of the fiction of an attributed will by saying that a corporation has a real general will is to drive out one fiction by another"¹. Sir John Salmond is of the view that even if the group will is a reality, it is not possible to concede "the reality of the unitary notional entity which may in law survive the last of its members"². He further points out that the realist theory is inapplicable to a *Corporation sole*. The attribution of personality to the succession of the holders of certain offices where there can be no pretence to psychological unity, is regarded by him as destructive of the realist theory of corporate personality. It may, however, be observed that as pointed out by Gray, "A corporation sole is not a fictitious or juristic person ; it is simply a series of natural persons some of whose rights are different and devolve in a different way from those of natural persons in general"³.

Even English law is now tending in the direction of according recognition to collective persons as real persons. In *Willmott v. London Road Car Company*⁴ a lessee covenanted not to assign or underlet without the consent of the lessor, which was not to be withheld in respect of "a respectable and responsible person." It was held that the word "person" in the covenant included a corporation.

That group or collective personality is a reality cannot now be seriously disputed in the light of the present day knowledge of mass psychology. Once it is realised that for the real existence of incorporeal persons, physical perception to the senses is unnecessary, it would be easy to see that moral entities are real organisms, endowed with a real will and can sustain legal personality since they are efficient subjects of rights.

(1) *Gray : Nature and Sources of the Law*, p. 55.

(2) *Salmond : Jurisprudence*, p. 432.

(3) *Gray : Nature and Sources of the Law*, p. 58.

(4) (1910) 2 CH. 525.

(8) LEGAL PERSONALITY OF THE STATE

The state is the crowning point of the social edifice. It is the greatest of all forms of social organisation. It owns immense wealth and performs functions of capital importance to its members. It would therefore be interesting to consider whether the state is endowed with a corporate personality and recognised as a person by the law.

There is no doubt that a developed system of law can possibly find no reason against recognising the state as a legal person. In our discussion about the nature of sovereignty we noticed that it is a matter of great difficulty to locate the sovereign power in a state. In view of this difficulty modern writers do not attribute sovereignty to any particular organ of the state, but regard the state as itself the sovereign. Sovereignty, it is now recognised, resides in the state, that is, in the community or people organised by historical circumstances into a state. The state is the sovereign. The laws are the state's laws, the revenues are the state's revenues; the public liabilities are the state's liabilities. There would, therefore, be no logical difficulty in conceding legal personality to the state. In India this step has been taken and Art. 300 of the Constitution of India provides that the Government of India may sue or be sued by the name of the Union of India and the Government of each state may sue or be sued by the name of the state.

The law of England, however, does not recognise the state as a legal person. Salmond suggests that the existence of monarchical Government in England has rendered superfluous the attribution of legal personality to the state. The king, besides being a natural person, is a corporation sole in which character he holds all the powers and prerogatives of the government. The rights and duties of the state are always regarded as pertaining to the King as the head of the state. For this reason no independent legal personality is recognised in the state.

In an instructive article on the '*Personality of the corporation and the state*' Jethrow Brown observes thus: 'Prohibited from admitting the personality of the state, either by the poverty of our ideas or by the conservatism of our temperament, we are driven to the device of attributing privileges and responsibilities to the king, which no one can suppose to be really his. A sounder legal theory, however, knocks loudly at our door and some day we shall awake to find

we have been talking in our sleep...The legal recognition of the state as a collective real person is simply a matter of time"¹

(9) JUDICIAL DECISIONS BEARING ON CORPORATE PERSONALITY

Judicial decisions have not adopted a consistent attitude towards the theories of corporate personality. As observed by Friedmann: "The legal theory and the legal practice of corporate personality have developed independently of each other"². A reference to some of the leading cases having ■ bearing on this subject will bear out the truth of this statement.

Single Member Company :—*Saloman v. Saloman & Co.*³ a trader sold a solvent business to a limited company. The company consisted only of the vendor, his wife and children. In payment of the purchase money the company issued debentures to the vendor. Subsequently the company went into liquidation. The question arose whether this debenture holder was entitled to be paid in preference to the unsecured creditors. The question was answered in the affirmative. Thus a man may become in effect his own preferred creditor by taking debentures from a company of which he holds practically all the shares. This is because the company has a legal *persona* distinct from that of the shareholders. It would appear from this decision that one can seek shelter behind this legal *persona* without one's real connection with the corporation being unmasked.

Enemy character of company : Piercing the veil :—In *Daimler company Ltd. v. Continental Tyre & Rubber Co. Ltd.*⁴ the respondent company was incorporated in England for the purpose of selling in England tyres made in Germany by a German Co. The bulk of its shareholders were Germans. After the outbreak of war between England and Germany, ■■ action was commenced in the name of this company for recovery of a trade debt. The action was resisted on the ground that the plaintiff was an "alien enemy" at war with England and that the suit was, therefore, not maintainable. The contention of the plaintiff was that the nationality of the company was distinct from that of the shareholders and that as it was registered in England it did not lose the status of a company registered in England though war had broken out. This contention

1. (1905) *Law Quarterly Review* (Sub-voce): p. 376.

2. *Friedmann: Legal Theory* (2nd Ed.) 373.

3. (1897) A. C. 22.

4. (1916) 2 A. C. 207.

found favour with the Court of Appeal but was not accepted by the House of Lords. Lord Parker of Waddington observed: 'What is involved in the decision of the Court of Appeal is that for all purposes to which the character and not merely the rights and powers of an artificial person are material, the personalities of natural persons who are its corporators, are to be ignored. An impassable line is drawn between the one person and the others. When the law is concerned with the artificial person, it is to know nothing of the natural persons who constitute and control it. It was held by the House of Lords that the enemy character of individual shareholders and their conduct could be material on the question whether the company's agents and persons in *de facto* control of the company were adhering to the enemy. If the persons in control of the company are resident in an enemy country or, wherever resident, are adhering to the enemy then the company would assume an enemy character.

In this case the House of Lords was prepared to pierce the veil sought to be drawn over the physiognomy of the company for the purpose of ascertaining who are the corporators that are behind the company. This decision, therefore seems to support the thesis of the realists that the group will is a reality and is not to be ignored in considering the actions of the corporation.

Importance of the act of incorporation :—*In Wurzel-v-Houghton, Main Home Delivery Service Ltd.* and in *Wurzel-v-Atkinson and others*¹ the difference between an incorporated and an unincorporated association in regard to legal consequences was brought out with telling effect. Under the Road and Rail Traffic Act, 1933, the holder of a private carrier's license (called 'C' license) was forbidden from using the vehicle for the carriage of goods for hire or reward. One group of miners desiring to co-operate in order to secure cheap delivery of coal from the Colliery at which they worked created an incorporated company. A motor goods vehicle in respect of which the company held a 'C' license was used for making a delivery of coal at the house of its members, the charges for the delivery being deducted from the wages of the member. It was held that as the society was incorporated it was a legal entity distinct from its members and consequently in the circumstances there was a breach of the conditions under which the 'C' license was held as the vehicle was used for the carriage of goods for 'hire or reward'. Another group

(1) (1937) 1 K. B. 380.

of workers merely formed an association without incorporating it and used a motor vehicle of the association for the same purpose. In this case it was held that each member is a part-owner of the vehicle and the co-owners cannot be said to be carrying their own goods for hire or reward by contributing to the running expenses, there was no breach of that condition of the 'C' license. Thus the effect of the act of incorporation is to introduce a new legal *persona* which owns vehicles and receives money for carrying coal belonging to the members. A clear-cut distinction is thus drawn between the personality of the company and the personalities of the members.

The decision of the House of Lords in *Taffvale Railway Co. v. Amalgamated Society of Railway Servants*¹ has blurred the distinction between an incorporated and an unincorporated association. Ordinarily only an incorporated body can sue or be sued while unincorporated bodies cannot sue or be sued in their own name. This rule was very useful to trade union organisations. They were usually unincorporated associations and so their assets were not liable for the activities of the representatives of the unions though such representatives would of course be personally liable for such activities. This immunity was a source of strength to the Trade Unions. In the *Taffvale Railway Co. case*, the House of Lords held that a Trade Union, even in the absence of incorporation and registration, under the Trade Union Act, could be sued in an action of tort for the wrongful acts of its officials. This decision was a cruel disappointment to the labouring classes and raised a storm of protest. The legislature had to intervene and pass the Trade Disputes Act of 1906 restoring the immunity of Trade unions from liability for the torts of their servants. The Act was modified in 1927 curtailing that immunity in the event of certain strikes and lock-outs in trades and industries.

The view that the basis of the distinction between incorporated and unincorporated associations consists in the very fact of legal personality has been shaken by the *Taffvale case*. In the case of unincorporated associations of a quasi-corporate type the distinction seems to be very fragile. From the foregoing review of some of the decided cases it would appear that no consistent theory of corporate personality has been uniformly adhered to by the courts in England

1. (1901) A. C. 426.

2. For further analysis of decisions, See Chapter XL. Sub ~~para~~ "corporate liability."

CHAPTER XXX

ACT : INTENTION : NEGLIGENCE

(1) DEFINITION OF ACT

(A) AUSTIN'S ANALYSIS

Act defined :—An act according to Austin is a bodily movement caused by volition. Volition is a movement of the human 'will' and consists in a desire for a bodily movement which is immediately followed by such movement, provided the bodily member is in a normal condition.

Nature of the human 'will' :—Act presupposes a 'will'. Any philosophical discussion on the nature of the faculty of will would here be out of place. For our purpose it is sufficient to consider the analysis given by Austin as to the mode of its exercise.

Austin says that certain movements of our bodies follow invariably and immediately our wishes or desires for those movements. The antecedent wishes are human volitions and the consequent movements are acts. It is supposed by some that besides the antecedent desire (styled a volition), and the consequent movement (styled an act), there is an instrument called the 'will' which is the cause or author of both. This 'will' is defined as the "psychical cause by which the motor nerves are immediately stimulated". Austin suggests that there is no such thing as the will and the term will, is merely a convenient expression for the customary antecedence and sequence of volitions and acts.

The dominium of the will is limited to bodily organs. If you will or conceive a wish that your arm should rise, desired movement of your arm immediately follows your wish. The will, however, does not extend to all bodily movements. Thus the motion of your heart would not be affected by a wish you might happen to conceive that it should stop or quicken. Also, the dominium of the will does not extend to the mind. Try to recall an absent thought or to banish a present thought and you will find that your desire is not immediately followed by the attainment of its object.

'Act': Austin's definition :—An act, according to Austin, is a movement of the will. It is a bodily movement caused by volition, a volition being a desire for a bodily movement which is immediately followed by such movement, provided the bodily member is in a normal condition.

Act distinguished from Consequences :—In common language an act is spoken of as expressing both the movement following upon a determination of the will and the consequences resulting from it. Austin says that the term act should be restricted to the bodily movement which follows upon a volition. An act is purely a "voluntary muscular contraction".

The Act should be distinguished from its consequences. Austin points out that while the act is *willed*, the consequences are not. If A shoots B, the act consists in raising and firing the pistol, for it is the incident which is willed. What follows the act and in connection with it are its consequences. These are not willed for they are not the object of volition but only *intended*. To *desire* the act is to will it; to *expect* the consequences is to intend them. The consequences of an act need not always be intended, for the party who wills the act may not expect the consequences.

(B) SALMOND'S ANALYSIS

Definition :—An act is defined by Salmond as "any event which is subject to the control of the human will".

Act and Event distinguished :—The distinction between a mere event or movement of the external nature and an act is important and consists in that the groundwork of every act is purpose. Where there is no purpose there is no act but only an event. Jhering illustrates the distinction by two examples. 'X jumped down from the tower, because he wished to kill himself.' Here the muscular movement of jumping is an act for it is done with a purpose. But, 'X lost his life, because he fell from the tower.' —here the falling is an event, not an act, because it was not a bodily movement which followed upon volition. The characteristic feature of an 'Act' which distinguishes it from an 'Event' is that it is essentially a movement of the will.

Difference between the views of Salmond and Austin :—Salmond is at one with Austin in the view that an act follows a determination

of the human will. But unlike Austin, he does not restrict the term to the muscular movement merely. According to Salmond every act is made up of three distinct factors. The bodily movement is but the first factor. It is the 'origin' of the act. The two other material elements are the circumstances accompanying the bodily movement and the consequences following it. Salmond accordingly holds that the circumstances and consequences of an act are also part of the act and cannot be considered to be external to it. In this view "every act is made up of three distinct factors or constituent parts"¹ its origin; circumstances and consequences.

Austin limits the term act to that part of it which Salmond distinguishes as its origin. We generally include the material circumstances attending the act as also the consequences following it under the name of 'act.' Thus, as Salmond points out, trespass is not regarded as consistting merely in the physical movement of stepping on land, but also in the circumstance that the land belongs to another.

Salmond shows that not only is Austin's view out of accord with common usage of speech but is likewise inadmissible in law. The prohibition of an act by the law applies alike to its origin, its circumstances and its consequences. The prohibition of murder, for instance, includes not merely the bodily movement, say of firing a pistol, but also the circumstance that it was not accidental and the consequence that the victim died. It is, therefore, submitted that Austin's view, according to which the only 'acts', properly so called, are movements of the body, is not tenable. Salmond is certainly justified in holding that the circumstances and consequences of an act are also its constituent parts.

(2) CLASSIFICATION OF ACTS

(a) **Acts in the law and Acts of the law :—**Acts may be classified as follows: An act in the law is a juristic act. Holland defines a 'juristic act' as "a manifestation of the will of a private individual directed to the origin, termination or alteration of rights."

Where an act in the law gives rise to duties, the duties are voluntarily incurred. The law sometimes binds a person against his will and imposes duties on him irrespective of his volition. A duty not to defame others, for instance, is not created by any juristic act

¹, *Salmond : Jurisprudence*, p. 368.

but has its source in an act of the law. The transfer of a right by sale is an act *in* the law while the transfer of the rights of a person dying intestate to his heir is an act *of* the law.

(b) Inward and Outward acts :—Mere determinations of the will are inward or internal acts. Determinations of the will which produce an effect upon the world are outward or external acts. Holland says that jurisprudence is concerned only with external acts and accordingly defines an act as “a determination of the will, producing an effect in the sensible world.”

(c) Positive and Negative Acts :—A positive act is an act of commission and results from a determination of the will to *do* some external act. A negative act is an act of omission and is called a forbearance.

(d) Intentional and Negligent Acts :—An intentional act is one that was foreseen and desired by the doer. Forbearance is an intentional negative act. An unintentional negative act is referred to as an omission. An omission is the not doing a given act without advertizing (at the time) to the act not done. Says Austin: “An omission is not the consequence of an act of the will, but of that state of the mind which is styled ‘negligence’ and implies the absence of will and intention”.

The terms ‘intention’ and ‘negligence’ used here are important legal conceptions. They refer to the state of mind of the person doing an act. We shall now proceed to consider the precise nature of these conceptions.

(3) ANALYSIS OF INTENTION

Austin’s view :—Intention is a particular state of mind of the doer of an act.

According to Austin, intention consists in advertence to concomitants and the consequences of a given act. Thus a man is said to intend an act when he does the act with the expectation that certain consequences would arise from it.

Salmond’s criticism :—Salmond points out that intention does not necessarily involve expectation. The essence of intention, in his view, is not expectation but desire. A person may expect a thing, but he is said to intend it only if he desires it. Salmond gives a telling

Illustration in support of his view. A surgeon about to perform an operation, he says, may know that the patient will not survive the operation and so expect the patient's death but the surgeon can hardly be said to have intended the patient's death for his desire is to cure. Salmond points out also that a person fires at a tree a mile away desiring to hit it, though he may expect that he would miss the mark, he nevertheless *intends* to hit it.

Salmond's view:—Salmond thus holds, differing from Austin, that it is not expectation but desire that is of the essence of the conception of intention. He defines intention as "the foreknowledge of an act coupled with the desire of it, or "the conscious direction of the mind towards a desired form of action." Consistently with his view that an act involves three elements—the origin, the circumstances and the consequences, Salmond holds that an act is intentional only if it extends to all these three elements. Thus if A trespasses on B's land believing it to be his own, there is no intentional wrong committed by him for his act is not intentional as to the circumstance that the land belonged to B.

Intention distinguished from motive:—Intention refers to the immediate purpose with which an act is done. It should be distinguished from motive or the ulterior purpose of the act. Where a person saves a drowning man, the intention of the person is to save him; but the motive with which he might have done the act may be to have him arrested under a warrant. Motive is therefore said to be the ulterior intent.

(4) ANALYSIS OF 'NEGLIGENCE'

(A) OBJECTIVE THEORY

Negligence is a particular course of conduct:—We have observed that negligence is a particular state of mind of the person who does an act. Some eminent jurists have taken the view that negligence is not a state of mind at all. According to Clark and Lindsell "negligence consists in the omission to take such care as under the circumstances it is the legal duty of a person to take."

Negligence, it is thus suggested, is not a subjective but an objective fact, being a particular course of conduct which has nothing to do

with ■ state of mind. In this view negligence consists in pursuing a course of conduct different from that of ■ reasonable and prudent person.

Salmond's Criticism :—Sir John Salmond shows that the view as set forth by the advocates of the objective theory is the result of incorrect analysis. Negligence, it is true, invariably results in ■ failure to take necessary precautions that ■ reasonable person would take. The failure to take necessary precautions does not, however, necessarily point to negligence. It may be accidental or even intentional. Objectively it is not possible to say whether a particular act is accidental, intentional or negligent. One has to observe the subjective attitude of a person towards his act before he can characterise it as negligent or not. Salmond, therefore, concludes that negligence, like intention, is a subjective fact and is a particular state of mind of the doer of the act.

Pollock's View examined:—Pollock observes that "negligence is the opposite of diligence" and since no one refers to diligence ■ a state of mind, he considers that negligence is also not a state of mind. With great respect to this learned jurist, it is submitted that the opposite of diligence is idleness, while negligence is more appropriately the opposite of intention. Since intention is admittedly ■ state of mind, negligence is such also.

(B) SUBJECTIVE THEORY

Even among the jurists who advocate the subjective theory of negligence, there is ■ difference of opinion as to the precise nature of negligence as ■ state of mind.

Austin's View :—According to Austin "want of *advertence* which one's duty would naturally suggest, is the fundamental or radical idea in the conception of negligence". In this view ■ negligent wrongdoer is one who does not know that his act is wrongful but would have known it were it not for his mental indolence and inadvertence. Thoughtlessness is thus of the essence of negligence.

Heedlessness: Rashness: Recklessness:—Austin draws a distinction between negligence, heedlessness and rashness. Negligence is the state of mind of the person who inadvertently *omits* an act and breaks ■ positive duty. As to the other two states of mind, he observes: "The party who is guilty of Temerity or Rashness, lik^e

the party who is guilty of Heedlessness, *does* an act and breaks a positive duty. But the party who is guilty of Heedlessness *thinks not of the probable mischief*. The party who is guilty of rashness thinks of the probable mischief, but in consequence of a missupposition begotten of insufficient advertence, he assumes that the mischief will not ensue in the given instance"¹. Thus in heedlessness the doer of the act does not bother to advert to the possible consequences. In rashness, while foreseeing the consequences, he foolishly thinks that they will not occur as a result of his act. There is another state of mind known as *recklessness* where the actor foresees the consequences but does not care whether they result from his act or not².

Criticism :—Salmond treats all these states of mind under the head of "Negligence". In all of them there is a failure to act up to the criterion or standard of care set up by the law, a failure to exhibit the amount of care required of a reasonable man. So it is permissible to disregard the shades of difference mentioned by Austin and to include rashness, heedlessness and recklessness also under the head of negligence.

Salmond's View:—Salmond shows that Austin's view is fallacious. In the first place, there may be advertent or wilful negligence as where a person foresees the consequences of an act and yet recklessly does the act without intending those consequences. This state of mind is described by Austin as 'Rashness', but may be included under 'negligence'. Inadvertence or want of foresight may proceed from ignorance despite a genuine and anxious effort to attain knowledge.

Salmond's own view is that the essence of negligence is *carelessness*. A person is said to be careless when he is indifferent to the results of his conduct. Owing to carelessness a person may not reflect on the consequences of his acts and so be inadvertent or lacking in foreknowledge of those consequences. Advertence to the consequences of the act is also compatible with carelessness, for a person may be fully conscious of the consequences of his act and yet do it without desiring those consequences. So says Salmond : "The essence of negligence is not inadvertence—which may or may not be due to carelessness—but carelessness—which may or may not result in inadvertence" He accordingly defines negligence as "the mental

1. *Austin : Jurisprudence*, p. 427.

2. *Paton : Jurisprudence*, p. 236.

attitude of undue indifference with respect to one's conduct and its consequence."

(C) RECONCILIATION OF THE OBJECTIVE AND SUBJECTIVE THEORIES

There are two applications of the term 'negligence'. Negligence may be contrasted with intention. Then it can only be a state of mind. The subjective theory then holds good. Negligence may also be contrasted with inevitable accident. In such a case it can only be a particular type of conduct. The objective theory of negligence will then be found to be applicable. In this way the objective and the subjective theories may be reconciled.

(5) DEGREES OF NEGLIGENCE.

Roman Law :—In Roman Law there were different degrees of negligence. The degree of care that a person had to take for exemption from liability for the damage caused to another depended upon the nature of the transaction in question. There were three degrees of care and correspondingly three degrees of negligence.

(i) **Culpa levis in abstracto :—**Culpa levis in abstracto was a failure to show *exacta diligentia* (*diligentia maxima*), that is, the care which a *bonus pater familias* would show in that particular transaction. This kind of care, the care shown by a good head of a family or an imaginary prudent man of business, was required of a person when a contract was concluded for his benefit or for the mutual benefit of both parties or when he voluntarily undertook a trust.

(ii) **Culpa levis in concreto :—**Culpa levis in concreto was a failure by a person to take that care which he is accustomed to show in his own affairs. A person who would be liable for *culpa levis in concreto* had to show ordinary diligence. Persons were liable for this kind of negligence where both parties had a common interest, e.g., partners, or where a contract was entered into solely for the benefit of the other contracting party. Thus a *depositarius* had to show not *exacta diligentia* but ordinary diligence.

(iii) **Culpa lata :—**Culpa lata or egregious fault was a failure to show any reasonable care at all. It is a fault that no man of intelligence would have committed. It amounts almost to *delus* or wrongful intention.

English Law & Indian Law :—The English law and, following it, the Indian Law, have not recognised different degrees of negligence. So far as the civil law is concerned there is only one standard of care, that of the reasonable and prudent man in the situation actually considered. A distinction is sometimes drawn between negligence and gross negligence. As to this Baron Rolfe observed in *Wilson v. Brett*¹ "I said I could see no difference between negligence and gross negligence, that it was the same thing with the addition of the vituperative epithet".

In the criminal law, however, degrees of negligence seem to be recognised. In *Andrews v. Director of Public Prosecutions*,² Lord Atkin observed : "The principle to be observed in cases of manslaughter in driving motor cars are but instances of a general rule applicable to all charges of homicide by negligence. Simple lack of care such as will constitute civil liability is not enough ; for purposes of the criminal law there are degrees of negligence ; and a very high degree of negligence is required to be proved before the felony is established. Probably of all epithets that can be applied 'reckless' most nearly covers the case. It is difficult to visualise a case of death caused by reckless driving in the connotation of that term in ordinary speech which would not justify a conviction for manslaughter."

1. 11 M. & W. at p. 113.

2. (1937) A.C. 576 (H.L.) followed in *Intoor John v. State* (1951) 2 M. L. J. 54.

CHAPTER XXXI.

CIVIL WRONGS AND CRIMES

(1) ANALYSIS OF WRONG.

Legal wrong :—A wrong means the infringement of a right or the breach of a duty. It is a legal wrong if the right infringed or the duty violated is one recognised by the positive law. The duty the violation of which is a legal wrong, may be one which is undertaken by the person himself who has violated it or one which is imposed upon him by the law. If a person enters into a contract, he undertakes a duty to perform the contract, and if he breaks the duty, he commits a wrong known as 'Breach of contract'. But wrongs may also be independent of contract. The state imposes certain duties upon people irrespective of their consent and breaches of such duties are wrongs which fall into two classes, viz., crimes and civil injuries or torts.

It must be observed at the outset that it is for the state to declare whether it will regard a wrong as a crime or as a tort. In either case the duty broken is one fixed by the state itself, but the degree of gravity with which the state looks upon the two cases is different. The state may regard a particular duty imposed by it as so important and the breach of that duty so serious that it punishes the wrong-doer to vindicate the offended majesty of the law. In such a case, the state calls the wrong a crime and when a crime is committed, it sets the law in motion of its own accord in the name of the sovereign. If, however, the state finds that the mischief is not so serious as to require its intervention, then it leaves it to the individual to vindicate his rights and recover compensation for the wrong. The wrong is then called a tort or civil injury.

(2) DISTINCTION BETWEEN 'CRIME' AND 'TORT'

To distinguish a tort from a crime several tests have been proposed by jurists.

(A) BLACKSTONE'S VIEW

According to Blackstone 'civil injuries are private wrongs and concern individuals while crimes are public wrongs and concern the state'.

the state. "The distinction of public wrongs from private, of crimes and misdemeanours from civil injuries, seems principally to consist in this: that private wrongs or civil injuries are an infringement or privation of the civil rights which belong to individuals considered merely as individuals; public wrongs or crimes and misdemeanours are a breach and violation of the public rights and duties due to the whole community considered as a community in its social aggregate capacity".¹

This suggestion, while true to some extent, is open to the following objections.

Criticism:—Kenny points out that all offences affect the community and all offences affect individuals. "Every illegal act—even a mere breach of contract—must be injurious to the community, by causing it alarm at least, if not in other ways." The effect on the public cannot therefore be accepted as the true test of distinction between the two kinds of wrongs. It may even be misleading and Kenny gives an illustration to show the futility of the test. He says, "The negligent mismanagement of a company may prove far more calamitous to the community than the stealing of a pocket handkerchief, and yet the former is not regarded as a crime while the latter is." Salmond also rejects the distinctive test suggested by Blackstone. He says that, in the first place, all public wrongs are not crimes. Thus "A refusal to pay taxes is an offence against the state but is only a civil wrong." In the second place, Salmond points out that all crimes are not public wrongs. Criminal proceedings may be taken by private persons in some cases.

(B) SALMOND'S VIEW

Salmond suggests a different ground of distinction. He considers that "the distinction between criminal and civil wrong is based not on any difference in the nature of the right infringed but on a difference in the nature of the remedy applied." Torts or civil wrongs, it is thus suggested, can be distinguished from crimes in that the object of a criminal prosecution is to punish the offender while the object of a civil action is the payment of damages to the injured party.

Why Austin rejected this Distinction—Austin considered this ground of distinction but rejected it in his '*Lectures on Jurisprudence*'. His objections are twofold. The remote end of enforcing all liability,

(1) *Blackstone : Commentaries*, BOOK 4; CHAP. 1, p. 640

whether civil or criminal, is the prevention of offences generally. So he considers that the object of the proceeding can be no criterion for judging whether a wrong is a tort or a crime. It may be that the *ultimate* end of all judicial proceedings, civil as well as criminal, is one and the same, namely the preservation of order in society, but it cannot be denied that there is a difference between the *immediate* ends in view in dealing with the two kinds of wrongs. Austin's second objection is that in certain kinds of criminal actions known as penal actions, it is the individual and not the state who is benefited by the penalty imposed. A penal action¹ is one by a private person for recovery of a pecuniary penalty. Some statutes impose pecuniary penalties upon offenders which are payable to the first person who might sue the offenders or give information leading to the offender's conviction. Salmond considers that these actions belong more appropriately to civil procedure than to criminal. Prof. Allen points out that penal actions are of an exceptional nature and can have nothing relevant to contribute to the analysis of a 'crime'.

View of English courts accords with that of Salmond :—The ground of distinction between crime and a tort suggested by Salmond seems to be the one recognised in English law. In *Re Clifford and O'Sullivan, in re*, (1921) 2 A. C. 570 Lord Cave observes: "To be a criminal matter it must involve the consideration of some charge of crime, that is to say, of an offence against the public law; and that charge must have been preferred before some court or judicial tribunal having or claiming jurisdiction to impose punishment for the offence or alleged offence." The latter part of this dictum makes punishment the true test of crime.

Criticism of Salmond's View :—The test of crime suggested by Salmond has the merit of being tangible and recognisable. The distinguishing mark *par excellence* of a crime is that it involves liability to punishment. At the same time it cannot be said that Salmond's suggestion contains "the whole truth and nothing but the truth." In criminal cases the court can and does sometimes order payment of compensation to the injured party and in enforcing liability in tort exemplary damages are sometimes awarded as punishment to the wrong-doer.

Prof. Allen points out that though punishment is a distinguishing mark of crime, it does not explain the nature of 'crime' itself.

(1) Penal Actions have been abolished by the Common Informers Act, 1951.

In his view "It is not enough to know that crime is punishable wrong, the problem is, why it is punishable"¹. From this point of view the distinctive test suggested by Blackstone is the more satisfactory one. Crime is a crime because it is wrong-doing that in a serious degree threatens the well-being of society.

(C) VIEW OF AUSTIN AND KENNY

According to Austin the distinction between tort and crime does not lie either in the nature of the offence or in the nature of the remedy applied. In his view the distinction is a procedural one. "Where the wrong is a civil injury", he says, "the sanction is enforced at the discretion of the party whose right has been violated, where the wrong is a crime, the sanction is enforced at the discretion of the sovereign"². In the case of a crime redress is sought by the state, while a private individual does so in the case of a civil wrong. Since the state is the manager of the action in the criminal case, the punishments of criminal procedure are remissible by the Crown only. In civil cases a private party is the 'manager' of the action and has it in his power to settle the matter and remit the sanction as he pleases.

Objection considered :—Salmond's objection to Austin's suggestion is that even criminal proceedings may sometimes be taken by private persons in some cases. Prof. Allen, however, considers that the private prosecutor is in reality nothing better than informant or complainant and although the Crown can permit a private person to set the machinery of criminal justice in motion, it remains absolute master of that machinery. In civil actions, the executive cannot stay the hand of a private party, for, as Prof. Allen observes, "There is no power in the land, short of Parliament, which can prevent a plaintiff from suing for the damages to which he has a reasonable claim"³.

Kenny in his *'Outlines of Criminal Law'* substantially agrees with Austin's view that the sanctions of crime are enforced by and remissible at the instance of the Crown. He points out, however, that in some cases even the Crown cannot forgive the offender. Thus even the Crown cannot condone an unabated public nuisance. Kenny,

1. Allen : *Legal Rights and Duties*, p. 233,

2. Austin : *Jurisprudence* p. 518

3. Allen : *Legal Duties and other essays*, p. 227:

therefore, slightly modifies Austin's suggestion. He considers that an offence pursued by and remissible at the discretion of the injured party is a civil injury, while one pursued by the sovereign and remissible, *if at all*, only at his discretion is a crime.

(D) CONCLUSION

Crime and Tort defined :—There are important elements of truth in all the various grounds of distinction discussed above. A definition of crime or tort ought to bring out all the characteristic points thus noticed. In *'Halsbury's laws of England'* Crime is defined thus: "A crime is an unlawful act or default which is an offence against the public and renders the person guilty of the act or default liable to legal punishment. While a crime is often also an injury to a private person, who has a remedy in a civil action, it is an act or default contrary to the order, peace and well-being of society that a crime is punishable by the state." This definition brings out the tests of crime propounded by Blackstone and Salmond. It does not bring out, however, the distinctive test adopted by Austin.

In the light of the foregoing discussion, we may define a 'crime' as a breach of public duty the sanction of which is punishment exigible or remissible at the discretion of the sovereign acting according to law. A civil injury or 'tort' may be defined as a breach of duty affecting private individuals, not arising out of trust or contract, the sanction of which is compensation exigible or remissible at the discretion of the party whose right has been infringed.

CHAPTER XXXII

THEORY OF LIABILITY

(1) KINDS OF LIABILITY

“Liability” defined :—Liability is exposedness to the sanctions of the law. It is incurred by the commission of a wrong and consists in those things which a person must do or suffer for having committed a violation of his duty.

Civil and Criminal Liability :—Civil liability is an exposedness to successful civil proceedings, while criminal liability is an exposedness to successful criminal proceedings. The nature of the distinction between the sanctions of civil and criminal proceedings has been already sufficiently considered in the previous Chapter.

Remedial and Penal Liability :—Where the state enforces a right that is due to the plaintiff and its purpose is not the punishment of the defendant, the liability is regarded as remedial. If, however, the purpose of the law is wholly or partly the punishment of the wrong-doer, the liability is described as penal.

The distinction between civil and criminal liability is not identical with that between remedial and penal liability.

Criminal liability is always penal for the purpose of criminal proceedings is the punishment of the offender. Civil liability, however, is not always remedial, for, though the immediate object of civil proceedings is compensation, in some cases there is also the ulterior purpose of punishment of the wrong-doer.

(2) THEORY OF PENAL LIABILITY

We shall now consider the theory of punishment or the general principles of penal liability.

Actus non facit reum, nisi mens sit rea :—The law deems a person a fit subject for penal discipline when he has committed a guilty act with a guilty mind. The maxim of the law is *Actus non facit reum, nisi mens sit rea*. The maxim means that an act does not become wrongful unless followed by a guilty mind. It mentions two conditions the co-existence of which alone justifies the imposition of penal liability.

(A) PHYSICAL CONDITION OF LIABILITY

Guilty Act:—The first condition is the *actus reus*—guilty act—which Salmond calls the physical or material condition of liability. The first requisite before punishment can be inflicted is an Act. However blame-worthy a man's intentions may be, he is not punished by the law, unless they materialise into some external act. As Justice Bryan said in an old case "The thought of man cannot be tried, for the devil itself knoweth not the thought of man". Kenny gives an example illustrative of this principle. "A man takes an umbrella from a stand at his club with intent to steal it, but finds it is his own". No guilt attaches to him legally.

(B) MENS REA

Intentional and Negligent Acts:—The second condition of penal liability is *mens rea* or guilty mind. Salmond calls this the formal condition of liability. The state does not impose liability the moment it finds a wrongful act. It enquires into the mental attitude of the doer to see whether it is guilty. The act is considered to be deserving of punishment only when it is done intentionally or negligently. Intention and negligence are the alternative forms in which *mens rea* may exhibit itself.

Austin says : "Intention or negligence is an essentially component part of injury or wrong, of guilt or imputability, of breach or violation of duty or obligation.....Intention or negligence is a necessary condition precedent to the existence of that plight or predicament which is styled guilt or imputability." Though intention and negligence are thus regarded as the two alternative formal conditions of liability, it is necessary to bear in mind that sometimes the law considers another state of mind called motive.

Material and Formal conditions should co-exist for punishment:—Punishment is justified only when these two conditions of mind co-exist, when the wrongful act is accompanied by the guilty mind, that is, when it is done intentionally or negligently. If a wrongful act is done intentionally, penal discipline will serve as a deterrent for the future. If it is done negligently or out of culpable carelessness, punishment will make the offender more vigilant and circumspect for the future. Punishment is thus justified only when the doer of a pernicious act exhibits a state of mind that renders punishment effective. This is the general rule. There are, however, certain wrongs known

as wrongs of absolute liability when the law, without looking for *mens rea* imposes liability as soon as the physical or material condition is satisfied.

(3) MALICE AND MENS REA

Meaning of Malice :—The term 'malice' has a variety of meanings. Sometimes it means "an intention to inflict harm". Thus in the phrase "malice aforethought" as applied to murder, malice means an intention to kill. In this sense malice is a necessary ingredient in all crimes requiring *mens rea*.

Malice also means spite, ill-will or other improper motive. In the tort of malicious prosecution, malice means improper motive, that is, any motive other than the promotion of justice. In an action for defamation malice should be proved if the defendant establishes the defence of qualified privilege. Here also, malice is equivalent to wrongful motive.

The general rule is that motives are not relevant for determining the existence of liability. In some exceptional cases, however, malice or improper motive becomes an essential factor in establishing criminal liability.

(4) DAMNUM SINE INJURIA

It is a general rule of law that an act *prima facie* lawful does not become unlawful and actionable merely because of the motives which dictated it. If damage is caused to others by such acts it would be a case of *damnum sine injuria* (damage without injury). Competition in trade, for instance, may lead to the ruin of some merchants. But the competitors have committed no actionable wrong even if they are actuated by improper motives. The general gain to society from competition in trade far outweighs any disadvantage to individual traders who may be driven to the wall. That is the theoretic justification for treating the damage caused in such a case as *damnum sine injuria*. In all cases of *damnum sine injuria*, motives are treated as irrelevant.

(5) RELEVANCE OF MOTIVES

Motive and Penal Liability :—Motive is the ulterior intention. As a general rule it is an irrelevant consideration, for the law does not treat an act as unlawful because of its blameworthy motive or regard it as lawful simply because its motive is laudable. Salmond mentions

'criminal attempt' ■■ an exceptional case in which the motive of the act becomes ■ material element in imposing penal liability.

Criminal Attempt :—An attempt to compass a crime is itself an offence. A criminal attempt is an act done with the ulterior intent of compassing ■ crime. The act in itself may be innocent and becomes punishable only because of the criminal motive by which it is actuated. There are four stages in every crime punishable under the Indian Penal Code. Mayne in his commentary to Sec. 511 of the Penal Code says, "Prior to the completion of a crime three stages may be passed through. First, an intention to commit the crime, may be conceived. Secondly, preparation may be made for its committal. Thirdly, an attempt may be made to commit it".¹ If the attempt is successful the fourth stage, namely the completion of the offence, would be attained. Of the three earlier stages the mere formation of the intention is clearly not punishable under the Penal Code. Nor is intention followed by preparation indictable. If however, an act is done towards the commission and in commencement of the commission, that act constitutes a criminal attempt which the law will punish although it does not succeed and the offence has not in fact materialised.

An attempt is made punishable because every attempt although it has failed of success must create alarm, which of itself, is an injury, and the moral guilt of the offender is no whit less than if he had succeeded in consummating the crime. Between a preparation and an attempt there is, however, no sharp line of distinction and the question whether it is the one or the other must depend upon the circumstances of each case.

In *Narayanaswami v. Emperor*² the accused was found travelling in ■ bus to Tranquebar carrying a certain quantity of opium for illegal delivery of it to a certain person in French territory which was about six or seven miles from Tranquebar. It was held that the act of the accused amounted only to preparation and not to an attempt since he had a *locus penitentiae* and could have changed his mind before reaching French territory.

In *Queen Empress v. Ramakka*³ where a woman ran to ■ well with the intention of committing suicide but was stopped

1. Mayne : *Penal Code (Commentary)* : 4th Ed. p. 946.

2. (1932) *Mad.* 507.

3. 8 *Mad.* 5.

before she could reach the well, it was held that she could not be convicted of an attempt to commit suicide.

An instance of attempt, as distinct from preparation, is given as an illustration to Sec. 511 of the Indian Penal Code and is as follows: "A makes an attempt to pick the pocket of Z by thrusting his hand into Z's pocket. A fails in the attempt in consequence of Z's having nothing in his pocket. A is guilty of a criminal attempt." From this it is clear that to amount to an attempt, the act in question should bear the criminal intent on its face. Further the act must be such as to end in the consummation of the offence but for circumstances independent of the will of the party.

Other instances where motive is relevant:—Ulterior intention becomes relevant when it is expressly made an ingredient of a particular crime. Thus under the Indian Penal Code the offence of criminal trespass is committed when a person enters upon property in the possession of another with a specific ulterior intent, namely, that of committing an offence or intimidating or annoying any person in possession of the property. In such a case the motive of the person entering upon the property necessarily becomes a relevant consideration in determining his criminal liability.

(6) EXEMPTIONS FROM LIABILITY

Necessitatis non habet legem:—Necessity has no law is a well-known maxim of the law. A person may be compelled to do an unlawful act under coercive pressure of such an intensity that he cannot be regarded as a free agent. In such a case though in one sense the act is done 'intentionally', it is not possible to attribute *mens rea* to the doer of the act. For this reason the great philosopher-jurist, Bacon, was of the opinion that if A and B, two shipwrecked sailors, catch hold of a plank not large enough to hold both of them, and A for self-preservation pushes B into the sea, A cannot be held guilty of a crime.

When the will of the doer of the act is overborne by the compulsion of the situation, *mens rea* is excluded, no liability should attach to the act. Though theoretically, *jus necessitatis* should altogether exempt a person from liability there are practical difficulties in giving effect to it so rigorously. That the situation was so compelling as wholly to deny freedom of choice to the doer of the act may not always be manifest. *R. v. Dudley*¹ two sailors and a boy were

1. (1834) 14 Q. B. 273.

adrift on the open sea on a small boat without food. After starving for nine days, the sailors, were-driven by the pangs of hunger into an act of cannibalism. They killed and ate the boy for their own self-preservation. They were subsequently rescued and were prosecuted for homicide. They set up *jus necessitatis* as a defence and relied upon Bacon's illustration of the ship-wrecked sailors. They were nevertheless, held to be guilty of murder. Lord Coleridge observed: "To preserve one's life is generally speaking, ■ duty, but it may be the plainest and the highest duty to sacrifice it." The normal punishment of death for homicide was not, however, enforced in this case. The Crown considering the extreme temptation to which the unfortunate sailors were exposed, commuted the punishment to one of imprisonment for six months. Thus *jus ncesssitatis* is a relevant consideration in determining the measure of liability, though it may not secure complete immunity from liability.

Mens Rea Absent:—Austin points out that the grounds of the various exemptions from liability are reducible to one and the same principle. A party is clear of liability because he is clear of intention or negligence or is presumed to be clear of intention or negligence. The exemptions are as follows.

Absence of will:—Where the law presumes that there can be no will at all, no penal liability can be imposed. Thus children under eight are regarded by the law as incapable of having ■ *mens rea*. An insane person also may be presumed to be devoid of will. In either case penal liability cannot be imposed.

Mistake:—Where the will is not directed to the deed, again, no liability can attach. This state of mind usually arises from mistake. In mistake the act is not intentional with reference to some circumstance attending the act. Mistake to be admitted as ■ ground of exemption from liability has to satisfy three conditions:

(a) The mistake must be such that had the supposed circumstances been real, they would have prevented any guilt from attaching to the person in doing what he did.

In *Reg v. Prince*¹ ■ person who abducted ■ girl under the legal age of consent was held criminally liable and the plea of inevitable mistake as to her age failed ■■ a defence. This is because the act of taking the girl away ■■■ itself wrongful.

1. L. R. 2 C. C. 154.

If the party's intent ~~was~~ lawful, mistake is a valid ground of defence to criminal liability. For instance, if A intending to kill B, kills C in mistake for B, he has no defence ; but if A, who is out hunting in a forest shoots at a bush thinking that a tiger was lurking inside and the bullet hits and kills B, he will be guiltless.

(b) The mistake should be reasonable.

(c) The mistake should relate to a matter of fact and not of law.

(7) ABSOLUTE LIABILITY.

We have already observed that there is a class of cases in which a person is held liable for his wrongful acts although they were not committed either intentionally or out of culpable negligence. Liability of this description is known as absolute liability,

Absolute liability is rare in criminal law. In civil law absolute liability is met with frequently. Salmond divides the chief instances of this kind into three classes—mistake of law, mistake of fact and accident.

(A) MISTAKE OF LAW

Ignorantia juris non excusat :—No one can escape liability for his acts by pleading ignorance of law. '*Ignorantia juris non excusat*' is the maxim of the law. The application of this maxim by which a man is made liable for breach of a law of which he had no knowledge in spite of his best efforts to acquaint himself with its provisions gives rise to a case of absolute liability.

The reason assigned in *Justinian's Digest* for inexcusability of ignorance of law is that "law both can and should be limited in extent." Blackstone also says that it is for this reason that the law presumes it to be possible for every person of discretion to know the law. Austin it is, however, that points out the true ground, at all events the only ground, upon which the rule in question can be rationally supported, when he bases it on expediency. He says : "The reason for the rule in question would seem to be this :—It not unfrequently happens that the party is ignorant of the law, and that his ignorance of the law is inevitable. But if ignorance of law were a ground of exemption, the administration of justice would be arrested. For, in almost every case, ignorance of law would be alleged. And, for the purpose of determining the reality and ascertaining the cause of the ignorance, the court were compelled to enter upon questions of fact, inscrutable and

interminable.....That the party shall be presumed peremptorily cognisant of the law, or (changing the shape of the expression) that his ignorance shall not exempt him, seems to be ■ rule so necessary that law would become ineffectual if it were not applied by the courts generally.”

The general rule is, however, subject to certain qualifications. In the first place, the rule is restricted to the general principles of law. Errors in regard to private rights are exempt from the rule. Secondly, the rule does not apply in England to the special rules developed in the Court of Chancery. Thirdly, law for the purposes of this rule means only the law of the land. In the case of foreign law there is no presumption of knowledge.

(B) MISTAKE OF FACT

In civil law mistake of fact, which may preclude *mens rea*, does not exonerate one from liability. Interference with the rights of another entails liability which cannot be escaped by pleading that the interference was not attributable to any wrongful intent on his part or to culpable negligence. Absolute liability is thus the general rule. In Criminal law, however, mistake of fact is often ■ good defence to a criminal proceeding, as we have seen in treating of ‘exemptions from liability,

(C) ACCIDENT

An act is said to be accidental when its consequences are not intended. Accidents ■■ culpable when they are produced by negligence and such accidents naturally give rise to liability. If I rashly drive ■ vehicle in ■ crowded street and cause injury to some one the injury may have been produced by accident, but it is culpable and I will be held liable for it. An accident is inevitable when it cannot be avoided by the exercise of the degree of care which the law expects from the people. The harm resulting from inevitable accident is not traceable to negligence or wrongful intention and does not ordinarily impose any liability. The rule in *Rylands v. Fletcher*¹ however, is ■ general exception to the principle that inevitable accident may be recognised as a valid defence to ■ proceeding for enforcing civil liability. According to that rule if a person keeps admittedly dangerous property on his premises and if by its escape harm is caused to another, though such escape

1. 3 H. L. 330.

may have been the result of inevitable accident, he shall nevertheless be answerable for all the harm that ensues. The liability in such a case is clearly an instance of absolute liability.

(8) VICARIOUS LIABILITY IN CIVIL LAW.

Vicarious liability means that one person is made liable for the wrongful act of another. In criminal law this kind of liability is not usually met with for no person is visited with criminal sanctions for the wrongs of another. In civil law, this kind of liability is well established.

Master and Servant :—Masters, for instance, are responsible for the acts of their servants done in the discharge of their duties.

The jural basis of this form of vicarious liability is to be found in expediency and public policy. Every person who commits a wrong while carrying on his own activities would be answerable to the injured parties for such wrong ; and if such person, whether out of luxury or for other reasons, desires that his business should be done by other persons, the law would permit such delegation only on condition of his continuing to be answerable for the conduct of those persons to whom he has delegated his business.

Servants are usually impecunious people and cannot pay compensation to the injured party. The master having placed the servant in a position where he can do injury to others is obliged by law to assume the liability to pay for the injury. The law in this way preserves ■ just correspondence between ability to pay for wrongs and opportunities for committing them.

But for the rule of vicarious liability, the injured party can claim from the master reparation for the injury done by the servant only if he can show that the wrongful act was actually authorised by the master. In view of the confidential relationship between master and servant, evidence of the master's complicity cannot be easily obtained even where it exists, and the claim will have to fail. The law, having regard to the evidentiary difficulties inherent in such a situation peremptorily lays down that if the act was done in the course of the servant's duties, the master's liability is made out.

It would thus be observed that the justification for vicarious liability is based upon public policy and expediency.

Legal Representatives :— A second form of vicarious liability is that imposed upon the wrong-doer's representatives after his death. Criminal liability no doubt cannot extend to a person's legal representatives. The liability arising out of a breach of contract, on the other hand, can and is enforced against the legal representatives of the parties to the contract. As regards liability originating in torts or delicts there was some difficulty in recognising vicarious responsibility. The maxim of the law was "*actio personalis moritur cum persona*". (A personal action dies with the person). Modern legislation has abrogated this common law rule. Under the Law Reform (Miscellaneous Provisions) Act, 1934, the causes of action subsisting against or vesting in a person, subject to some exceptions and restrictions, survive against, or as the case may be, for the benefit of his estate.

The justification for this species of vicarious liability is to be sought in the fact that its recognition is necessary as a deterrent to wrong-doing. An incentive to wrong-doing would be afforded if the law declares that the death of the wrong-doer would involve the extinction of liability in respect of the wrong. A person who has not long to live may launch upon defamatory attacks upon his enemies if he can do so with impunity. The knowledge that his estate would be answerable in damages for such wrong would serve to check and in some measure counteract such mischievous propensities. From the point of view of the injured party, there is no reason why a right of action which has accrued to him should be extinguished by the adventitious and accidental circumstance of the death of the wrong-doer. Thus the law is justified in fixing legal representatives with vicarious liability for the wrongs of the deceased wrong-doer.

(9) VICARIOUS LIABILITY IN CRIMINAL LAW

Vicarious liability is very uncommon in criminal law. A cannot be punished for a crime committed by B. He may be punished as an abettor of the crime of another, but in such a case he is punished for his own act of abetment and not for the criminal act itself. In India vicarious criminal liability is met with in some cases. Thus under Sec. 155 of the Indian Penal Code a person is held liable for a riot committed on his land, if it was for his benefit and his agent or manager, having reason to believe that such a riot was likely to be committed, takes no steps to prevent or to suppress it.

(10) LIABILITY OF CORPORATIONS

Theoretic difficulty :—The liability of corporations raises some difficulties for the supporters of the 'fiction theory' of corporate personality. The realist theory regards the corporation as a psychic reality and does not encounter any difficulty in fixing a corporation with liability either in tort or under the criminal law. It is otherwise with the fiction theory.

(A) TORTIOUS LIABILITY

(i) **Doctrine of Ultra Vires :—**Since a corporation has no actual existence, it can have no will and therefore can have no guilty will. Further, the only acts of which the law takes cognisance as the acts of the corporation are those that are connected with the purposes which the corporation was created to accomplish. So even if the legal fiction which gives to a corporation an *Imaginary existence* may be stretched so far as to give it also an *Imaginary will*, the only acts that can be ascribed to this fictitious will are those which it is permissible for the corporation to do as being *intra vires* of its memorandum of association. Hence it follows that a corporation cannot compass either a tort or a crime for any illegal act would be necessarily *ultra vires*.

Baron Alderson in *Stevens v. Midland Counties Railway Company*¹ expressed himself to be of the opinion that since a corporation has no mind, it cannot be held liable in any civil action in which malice is a necessary ingredient. In *Abrath v. North Eastern Railway Company*², Lord Bramwell, an eminent judge and jurist, was very strongly of the opinion that a corporation being incapable of malice or motive, an action for malicious prosecution could not be maintained against a company.

The progress of commercial development has been rapid and corporations are now so numerous that it would involve grave public danger if corporations are given any such immunity as is claimed for them by Bramwell J. How then are we to fix the theoretic basis of the liability of a corporation.

Salmond's solution :—Salmond suggests that the solution of this problem of the theoretic basis of the liability of corporations is to be sought in the principle of vicarious responsibility.

(1) (1854) 10 Ex. 352.

(2) (1886) 11 A. C. 247 on appeal from Q. B. D. 440

The rule of vicarious liability makes a master responsible for the acts of his servants done in the course of their employment. Corporations are persons in the eye of law and this rule which is applicable to principals acting by agents is extended to them. So, if a servant of a corporation acting within the scope of his authority commits a civil wrong in doing an act within the scope of the corporation's powers, the corporation would itself be held liable for the tort provided the act done would be an actionable wrong if committed by a private individual.

This view has been given effect to in decided cases.

Lindley, J., has held in *Citizen's Life Assurance Company v. Brown*¹ that if a libel is published by the servant of a company in the course of his employment, the company can be made liable for it on the ordinary principles of agency. He rightly observes that "if it is once granted that corporations are for certain purpose to be regarded as persons, *i. e.*, as principals acting by agents and servants, it is difficult to see why the ordinary doctrines of agency and of master and servant are not to be applied to corporations as well as to ordinary individuals."

It is now generally agreed that corporations should be made vicariously liable for the acts of their agents done in the course of their employment, although express malice cannot be proved as such in the corporation itself.

(B) CRIMINAL LIABILITY

Corporations liable for crimes :—Originally corporations were entirely outside the criminal law. Considerations of expediency have, however, managed to brush aside the various theoretical difficulties in fixing corporations with criminal liability. It is now settled law that corporations may be indicted by the corporate name. This position however, had not been reached all at once. At first when a crime was committed by orders of a corporation, criminal proceedings could be taken only against the separate members in their personal capacities. The corporation itself was immune from criminal liability. Later, an indictment against the corporation was made available in the case of *offences of non-feasance*. This became necessary for the reason that the omission or non-feasance would not be imputable to any individual agent but solely to the corporation itself. Still later indictments were allowed even for a *misfeasance*.

(1) (1904) A. C. 423.

Breakdown of Fiction Theory:—Salmond is able to explain the tortious liability of corporations consistently with his fiction theory on the basis of the principle of vicarious liability. This principle has no application to criminal law which does not recognise vicarious liability. So Salmond is obliged to concede that “the criminal liability of corporations must be looked upon as exceptional”.¹ This concession is an indication of the inadequacy of the fiction theory.

Scope of criminal liability of corporations:—There is thus no longer any difficulty in indicting a corporation but there may be difficulty in punishing it. The maxim is still true that a corporation has no soul to be damned and no body to be kicked. There is thus an inevitable limit to the range of the criminal liability of a corporation. The limit is that a corporation can only be prosecuted, as such, for those offences which the law allows to be punished by fines, which may be inflicted upon the corporate property. If the orders of a corporation have resulted in offences so heinous as cannot be punished adequately by pecuniary penalties, the particular members of the corporation responsible for them should be individually indicted in their own name and punished in their own persons.

(C) IS THE RECOGNITION OF THE LIABILITY OF A CORPORATION OPPOSED TO NATURAL JUSTICE

The acts, whether tortious or criminal, for which corporate property becomes liable, are the acts of the directors or agents of the corporation. When the corporation is made liable for these acts, the property of the corporation, that is of its beneficiaries, the members or shareholders, is made liable for those acts. Is this consistent with natural justice? Salmond gives a cogent answer to this question when he points out that in reality the directors are only the agents or servants of the beneficiaries themselves and so there is no violation of natural justice in making the corporate property liable for the acts of the directors of the corporation.

(D) JUDICIAL DECISIONS

Abrath v North Eastern Rly. Co.:—The plaintiff, a surgeon had attended one M. for bodily injuries alleged to have been sustained in a collision upon the defendants' railway. M brought an action against the defendants, which was compromised by the defendants

1. *Salmond : Jurisprudence 10th Ed.* 335.

paying a large sum for damages and costs. Subsequently the directors of the Railway Company came to know that the injuries of which M complained were not caused at the collision, but were produced wilfully by the plaintiff with the consent of M for defrauding the defendants. Thereupon they prosecuted the plaintiff but he was acquitted. The suit was brought by the plaintiff for damages for malicious prosecution. In such an action, he has to prove : (1) that he was innocent and was pronounced to be innocent by the tribunal before which the accusation was made; (2) that there was a want of reasonable and probable cause for the prosecution, and (3) that the proceedings of which he complains were initiated in a malicious spirit. The suit was dismissed ■ the second point was not made out by the plaintiff. As to the third point, Lord Bramwell observed : "A corporation is incapable of malice or motive.....If the directors even by resolution at their board or by order under the common seal of the company (I am putting the case plainly in order that there may be no mistake about it), were maliciously, with the view of putting down a solicitor who had assisted others to get damages against them, to order a prosecution against that man, if they did it from an indirect or improper motive no action would lie against the corporation because the act on the part of the directors would be *ultra vires*, they would have no authority to do it. They are only agents of the company; the company acts by them, and they have no authority to bind the company by ordering ■ malicious prosecution."

Citizen's Life Assurance company-v-Brown (1904) A. C. 423 : Brown was an ex-employee of the appellant Insurance company. He took employment under a rival company and was trying to induce the policy holders of the appellant company to leave the company and insure in the other company. Thereupon the Superintendent of the appellant company sent a circular letter to the policy-holders. This circular contained statements which were actuated by malice and were admittedly defamatory of Brown. Brown claimed damages from the company. The question was whether the malice of the employee could be imputed to the company and whether it could be made liable for libel published by the employee in the course of his employment. Lord Lindley observed as follows : "There is no doubt that Lord Bramwell held strongly to his opinion that ■ corporation ~~was~~ incapable of malice or motive and that an action for malicious prosecution could not be maintained against a company.....But this

opinion has not prevailed and their Lordships are not prepared to give effect to it. If it is once granted that corporations are for civil purposes to be regarded as persons, i. e. as principals acting by agents and servants, it is difficult to see why the ordinary doctrines of agency and of master and servant are not to be applied to corporations as well as to ordinary individuals.....To talk about imputing malice to corporations appears to their Lordships to introduce metaphysical subtleties which are needless and fallacious."

It was held that on the ordinary principle of vicarious liability the company as principal was liable for the tortious act of its servant as the act in question was one within the scope of his authority.

CHAPTER XXXIII

LEGAL SANCTIONS

(1) MEANING OF SANCTION

Sanction distinguished from Punishment :—Sanction consists in the application of the physical force of the state for the enforcement of law. Punishment or penalty is an evil inflicted upon a wrong-doer, such ■■■ bodily pain, imprisonment etc. Punishments are pre-eminently the sanctions of criminal law. They are ultimate sanctions. The term sanction is thus wider than punishment which is but one kind of sanction. Besides punishment there are other sanctions as well. Civil sanctions, for instance, have restitution or compensation as their object. They are intermediate sanctions.

Sanction distinguished from liability :—‘Sanction’ should be distinguished from ‘liability’. Sanction is evil incurred or to be incurred by disobedience to the law. Liability is exposedness to the sanctions of the law. It is incurred by the commission of a wrong, and consists in those things which a person must do or suffer for the violation of his duty.

(2) CLASSIFICATION OF SANCTIONS

Religious, legal and moral sanctions :—Sanctions may be classified as religious, legal and moral. The sanctions imposed by the law of God may be termed *religious*; those of positive law, legal or political; and those of positive morality, *moral*.

Civil and Criminal sanctions :—Legal sanctions may be divided into civil or private sanctions and criminal or public sanctions.

Criminal sanctions are of the following kinds :—

- (i) Capital punishment (ii) Deportation
- (iii) Imprisonment (iv) Corporal punishment
- (v) Fine (vi) Deprivation of civil rights, such as voting or holding office.

These are the various kinds of punishment known to our law. Among Civil sanctions the following may be enumerated :

- (1) Damages which may be (a) liquidated or unliquidated.
- (b) Normal, or special;

(2) **Costs**, whereby the unsuccessful party to a litigation is required to reimburse the successful one the expenses incurred by him in vindicating his rights.

Other civil remedies which may also be deemed sanctions are

(a) Restitution of property;

(b) Specific performance of a contract; and

(c) Injunction which may be either prohibitory, when it forbids the defendant from doing something, or mandatory when it requires the defendant to do something for the plaintiff.

Ultimate and intermediate sanctions :—Sanctions are also divisible into ultimate sanctions and intermediate sanctions.

When a person has broken a primary duty, the sanction that is applied by the law may consist in the imposition of another duty on the violator. The sanctioning duty is called an intermediate sanction. A sanction which is not the imposition of another duty, but which is the liability to some other evil is called an ultimate sanction.

The ultimate sanctions are bodily pain, imprisonment, forfeiture of property etc. Civil courts have no power to apply any ultimate sanction other than that of simple detention. Civil sanctions have as their object compensation. It is only if the order to pay compensation disobeyed that the ultimate sanction is brought into play. Criminal courts of course apply the ultimate sanctions at once.

Sanction of Nullity :—Mention may also be made of the 'Sanction of Nullity'. This consists in a refusal by the court to help a party who has disregarded the law. Thus a will which is not properly attested is not given effect to in a court of law. It may be observed that the sanction of nullity is a civil sanction. It is the means whereby the rules of evidence and procedure are enforced.

(3) DETERRENT PUNISHMENTS

(A) CAPITAL PUNISHMENT

Reduction in number of capital offences :—There has been a steady decrease in the number of offences for which the penalty is death. In the time of George III there were 220 capital offences. In 1810 when a bill was brought forward to abolish the death penalty for the crime of stealing in a shop to the value of 5 shillings Lord Ellenborough pleaded against the Bill in the House of Lords.

The noble Lord observed: "Your Lordships will pause before you assent to a measure so pregnant with danger for the security of property. The learned judges are unanimously agreed that the expediency of justice and the public security require that there should not be a remission of capital punishment in this part of the criminal law. My lords, if we suffer this bill to pass, we shall not know where we stand, we shall not know whether we are on our heads or on our feet".

In spite of such gloomy prognostications, Capital punishment has been disused without any untoward effects in the case of many offences. At the present day the death penalty is reserved only for such offences as murder and treason. In some countries, for e.g. in Norway, Sweden, Denmark, Holland, Belgium, Finland, Cantons of Switzerland and some of the states of the American Union, the death penalty has been altogether abolished.

Arguments in favour of retention of Death Penalty:—The usual arguments in favour of retaining capital punishment will now be dealt with:

(1) Death penalty has a greater deterrent influence upon potential criminals than any other penalty because it is presumably the most frightening.

The fallacy of this argument lies in the assumption that deterrent effect increases *pari passu* with the severity of the punishment. Provided a punishment is sufficient to give a potential offender the general sense that it would be a very serious misfortune to incur it, it is doubtful how far its deterrent effect will be increased by any addition to its severity. Further, the best way of deterring is not by severity but by making conviction almost certain. In all probability permanent segregation will in the long run have even a greater deterrent influence than the death penalty for it is found in practice that criminals can face the prospect of death with greater equanimity than they can face the prospect of perpetual incarceration.

(2) Death is the most effective preventive punishment. Dangerous members of society are thereby permanently eliminated.

In earlier times this argument had certainly great force. Police protection at that time was weak and inefficient. Facilities for inflicting long continued penalties such as imprisonment were non-existent. It was therefore inevitable that executions of apprehended criminals should be carried out in those times in order to check the offenders effectively in their criminal careers.

Social conditions have now considerably changed. The efficiency of the police force and the means of tracking down criminals have grown remarkably. The permanent segregation of offenders who are a menace to society is now a feasible proposition. It is, therefore, no longer necessary to retain the death penalty as an effective preventive punishment.

(3) If death penalty is abolished, it would entail a considerable expense upon society to maintain incorrigible offenders for the duration of their natural lives.

This argument too is easily met. The expense can be partly, if not entirely, recouped by requiring the criminals to engage in productive labour in the prisons. Even assuming that considerable expense must be incurred on the upkeep of the prisoners, there may be other gains from the abolition of the death penalty which will more than compensate society for that expense. What these advantages are will now be considered:

Arguments for abolition of death penalty :—(1) The death penalty is a survival of the *lex talionis*, the taking of a life for a life. The Mosaic law "Life shall go for life, eye for eye, tooth for tooth, hand for hand, foot for foot" is unsuited for mature jurisprudence and so the death penalty should be disused.

(2) Owing to the fallibility of human justice, irredeemable errors may be committed if the death penalty is inflicted. Judicial mistakes do occur and, when the accused is still alive, they can be remedied. In 1950 Timothy John Evans was convicted of the murder of his wife and infant daughter. He was sentenced to death and the then Home Minister, Mr. James Chuter Ede, refused to reprieve him. Timothy was hanged. Later on, John Christie, mass killer, who lived in the same house, confessed that he was the real murderer. This incident wrought a great change in Mr. James Ede. From a supporter of Capital punishment, he has become an abolitionist.

(3) The death penalty is the most arbitrary of all punishments and is a serious obstacle in the way of individualization. Its abolition would make more feasible the individualization of the penal treatment of murderers.

(4) Great reformers of law have advocated the abolition of the death penalty. Beccaria, the great Italian jurist observed: The punishment of death is pernicious to society from the example of barbarity it affords.....What are the natural sentiments of every

person concerning the punishment of death? We may read them in the contempt and indignation with which every one looks on the executioner." The founder of the science of legislation, Jeremy Bentham, was an ardent admirer of Beccaria for he referred to the latter as "My Master, first evangelist of reason, who has raised Italy so much above England and France, thou who speakest reason on law." Bentham said: By disusing the death penalty as a punishment you will prevent it as a crime." There is much truth in the words of Hans von Hentig who observes as follows in his '*Punishment' Its Origin and Purpose*'¹.

"The state can only put real life into the principle of the inviolability of life which it continually and rightly advocates in its reasons for condemning murderers, and in its laws, if it sticks to its own principle through thick and thin...Only the state which, consciously and with all due deliberation, puts up capital punishment like a sword into its sheath, has done everything which lies in its power to protect the citizen from murderous attack by another. It has sent out the most cogent suggestion there is, an example and model of behaviour according to a rule, which may be all the more unconditionally demanded of others, the more ruthlessly one demands it of oneself."

Attempts in England to abolish the death penalty :—In 1948 an English Member of Parliament moved a clause in the Criminal Justice Bill, with the object of providing that there should be a five-year period of suspension of the death penalty in order to test whether or not the murder rate would be affected. In a free vote of the House of Commons, this clause was passed but it was thrown out by the House of Lords. A Royal Commission (Gowers Commission) was, however, appointed to go into the question. The Gowers Commission was to "consider and report whether liability under the criminal law in Great Britain to suffer capital punishment for murder should be limited or modified." The commission was thus precluded by its terms of reference from recommending outright abolition of capital punishment. The members of the Commission have suggested in their report that cases in which the death penalty is awarded may be minimised by raising the eligible age from 18 to 21, scrapping or modernising the M'Naghten rules governing insanity, getting rid of the doctrine of constructive malice and the cruel law

(1) *Hans Von Hentig: Punishment : its Origin and Purpose.* 171.

about survivors of suicide pacts, recognising that sudden homicidal anger can be provoked as often by words as by deeds, and finally giving juries the discretion to substitute a sentence of imprisonment for the sentence of death. The commissioners have thus done everything short of recommending the abolition of death penalty. They imply throughout the report that it is not proper to remain complacent about the present position of law in regard to capital punishment. In many parts of the Report the Commissioners treat the death penalty as itself being virtually under sentence.

On 16th of February, 1956, the House of Commons decided by 293 votes to 262 to abolish the death penalty for murder in Britain. The motion on which the vote was taken urged the House to abolish or suspend the death penalty, because it "no longer accords with the needs or the true interests of a civilised society." The verdict of the House was reached on a "free vote" when members of all parties were allowed to vote according to their conscience and not on any party line. The Conservative Government is, however, opposed to the abolition of the death penalty. It has refused to introduce a Bill giving effect to the House of Commons vote in favour of suspending or abolishing the death penalty. It would perhaps let the House of Commons legislate on the issue by a private member's Bill.

Position in Russia :—In pre-revolutionary days in Russia, banishment to Siberia was the usual punishment for nearly every type of offender against the civil and political code, though the death penalty was applied in cases of serious crimes against the State. In May, 1947, the death penalty was abolished even in these cases, but was restored in January, 1950, for those proved "traitors to the homeland, spies and saboteurs." Recently it has been introduced for civil murders for the first time in the history of the Soviet Union by a decree issued by the presidium or directing body of the U. S. S. R. Supreme Soviet.

Countries where it is retained or abolished :—Principal countries which retain the death penalty for murder are the United Kingdom, Eire, France, Greece, Spain, Afghanistan, Burma, Ceylon, India, Pakistan, Japan, Palestine, Turkey, all States in the U. S. except Maine, Michigan, Minnesota, North Dakota, Rhode Island and Wisconsin; Canada, Mexico, Nicaragua, Panama, West Indies, Bolivia, Chile, Paraguay; the whole of Africa; all states in Australia except

Queensland ; and all British colonies and dependencies not mentioned above. The death penalty for murder was abolished in Western Germany during the first term of Dr. Adenauer's Government. It has also been abolished in Denmark, Holland, Belgium, Norway, Sweden and Italy.

(B) CORPORAL PUNISHMENT

Abolition of Whipping :—Corporal punishments have a tendency to degrade the offender and induce in him not a feeling of introspection and penitence but a feeling of hostility towards society which has brutally subjected him to such a barbarous punishment. In England this form of punishment was abolished years ago. In India also this reform has been felt to be long over due. In 1955 Parliament has passed an Act for the abolition of whipping as a form of punishment. Pandit Pant, India's Home Minister, pointed out that whipping only hardens the offender and makes it harder than ever to make of him a decent citizen afterwards. He also observed that such a punishment is not "In consonance with the spirit and principles of non-violence." Under the lead of the Home Minister the Legislature has taken a step in the right direction. It is to be hoped that this is only a first step towards the introduction of many other much needed reforms in the penal law of India.

(C) COLLECTIVE FINES

Collective Fines :—Sometimes punitive fines are inflicted on all the inhabitants of a village for an offence by some of the villagers. Such punishment cannot be justified for the essential ingredient of *mens rea* is absent in such cases. Further, punishment would not be justified, as pointed out by Bentham, if the evil necessarily attendant upon punishment exceeds the evil resulting from the offence itself. In such a case punishment produces more suffering than it prevents. That is why, where a great multitude of people are involved in an offence, it sometimes becomes necessary to pass an Act of Amnesty. The only justification for the imposition of collective fines is to produce a deterrent effect in abnormally turbulent times. Extraordinary legislation in such times may dispense with *mens rea* and sanction the imposition of collective fines. But such legislation disfigures the statute book and should be abrogated as soon as the emergency passes.

(4) REFORMATIVE PUNISHMENTS

Imprisonment:—Imprisonment as a mode of punishment is admirable under the reformatory theory provided the conditions in prison are made congenial for the moral education of the criminals.

Up to the latter part of the 18th century prisoners were mingled together indiscriminately with little or no attempt at segregation or classification. John Howard in his reports on jail conditions published in 1773 exposed the physical and moral evils arising from this indiscriminate and heterogeneous method of imprisonment. In 1776 a model prison was built by the Duke of Richmond at Horsham where for the first time solitary confinement was used as a means of punishment. The underlying idea of this punishment is that by segregating the prisoners in individual cells, they would be encouraged to repent of their misdeeds in solitude. In America this type of cellular confinement came to be known as the Pennsylvania system because it was introduced first in the state penitentiary of Pennsylvania.

The Auburn System:—The idea that prisoners should be made to work led to prison reform. Most of the forms of work suitable for the prison had to be carried out in large workshops. The Auburn system of imprisonment was accordingly devised and was so called as it was tried out originally in the New York State prison at Auburn. The prisoners were marched into the workshops to work during the day in silence under strict supervision but were kept in solitude the rest of the time. Sing-Sing prison, 33 miles from New York City, was built with the labour of Auburn prisoners and the Auburn system was introduced in that prison as well.

The 'separate' system associated with the name of Pennsylvania and the 'congregate' system associated with that of Auburn, were distinct improvements over pre-existing prison systems and were milestones on the path towards the reformatory method.

'Borstal' institutions:—Borstal institutions are places in which juvenile offenders are given industrial training and other instruction and subjected to disciplinary and moral influences conducive to their reformation. The age when the majority of habitual criminals is made lies between 16 and 21. The most determined efforts should be made to lay hold of these incipient criminals and subject them to rational treatment so that they

may become law-abiding citizens instead of becoming habitual offenders. 'Borstal' institutions, so called from the name of the village where this experiment was first carried out, are best fitted for the treatment of adolescent offenders on reformatory lines.

Probation:—A distinct American contribution to penology is the development of *probation*. Offenders are let off under this system upon entering into a bond of good behaviour for a period not exceeding three years. If the prisoner commits no further offence during that period, he escapes punishment. If he commits another crime, he renders himself liable to punishment for the first. The prisoner is usually placed under the care of a probation officer who would act as a guide and friend to him.

Parole:—Parole is a conditional release from prison or reformatory institution in which the offender has served a part of his sentence. The condition imposed is that of maintaining good behaviour. The released prisoner is put under the supervision of a parole officer whose function is to afford him all possible help.

Indeterminate sentence:—The system of sentencing prisoners to definite terms of imprisonment is comparable to a system according to which small-pox patients would be sent out after a set period, whether cured or not. An improvement upon this method had been devised. In the method of indeterminate sentence, associated with 'Elmira' a reformatory established in New York in 1869, the period of detention is undetermined. Reformation is made the key to the release of the prisoner. This introduces an element of elasticity as to the period of the sentence, so that an offender may not be detained after he has reached the stage of fitness for release, nor let loose upon society prematurely even before reaching that stage.

PART SIX

SOURCES OF THE LAW

“Judex est lex loquens”

(A judge is the law speaking)

—Coke.

CHAPTER XXXIV

CLASSIFICATION OF SOURCES OF LAW

Meaning of "Source of Law":—The expression 'Source of law' is used in different senses. It is necessary, therefore, to distinguish between its various meanings and determine its precise connotation.

Formal Source:—The expression is sometimes used to denote the ultimate authority which clothes a rule with legal sanctions. That authority can of course only be the state. Sir John Salmond calls this the *formal* source of law. Prof. Allen considers that the conception of a 'formal source' is wholly unnecessary since it only means that the state will recognise as law that which is law. We may observe, however, that the state is commonly referred to as the source of law, and so Salmond did well to emphasise by this conception of the 'formal source' that the force of law springs from the will and power of the state.

Literary Source:—The quarter to which we can trace a rule of law is also referred to as a 'source' of law. From standard legal treatises, statutes and the law Reports we derive our knowledge of the law. These may appropriately be called the literary sources of the law.

Material Source:—The expression 'sources of law' also signifies the various processes in society by which are evolved the materials which make up the general body of law. These are designated by Salmond as the 'material sources' of law for they indicate the sources from which the matter of the law takes its shape. It is in this sense that the expression is to be understood in this work.

Classification of Sources of Law:—The sources of law (by which we mean the 'material sources') are divisible into two classes—legal and historical. A source which the law itself recognises as authoritative and which, therefore, possesses an inherent binding force, is called a legal material source. For instance, a statute enacted by a competent legislature becomes law at once and *ipso jure*. That legislation is a valid method of legal evolution is itself a legal principle. Legis-

lation is thus a legal material source of law. A material source which is not recognised as such by the law and which for that reason possesses no binding efficacy, though it has persuasive value, is called an historical material source. The opinions of eminent jurists come under this category. They are entitled to great weight but are not binding law in themselves. They may be embodied in a statute, which of its own force operates as law. In such a case the statute is the legal material source while the juristic opinion is the historical material source of the particular law in question.

Legal Material Sources:—We are concerned here with the legal-material sources of law. These are (i) Custom giving rise to customary law; (ii) Precedent giving rise to case-law; and (iii) Legislation giving rise to enacted law. We have placed them in the order in which they have made their appearance in legal history and shall now proceed to a detailed consideration of their nature and the part which they play in the process of law-making.

CHAPTER XXXV

CUSTOM

(1) NATURE OF CUSTOM

What is custom :—Custom may be defined as the uniformity of conduct of people under like circumstances. In the *Tanistry case*¹, custom is described thus : “It is *jus non scriptum* and made by the people in respect of the place where the custom obtains. For where the people find any act to be good and beneficial and apt and agreeable to their nature and disposition, they use and practise it from time to time, and it is by frequent iteration and multiplication of this act that the custom is made and being used from time to time memory runneth not to the contrary obtains the force of law”.

In primitive societies of which we have evidence custom is the only law that we can discover. We may safely conclude that at the beginning of society there could be no articulated system of law-making or law dispensing power and conduct was regulated by practices that came into vogue spontaneously. As Herbert Spencer points out : “Before any definite agency for social control is developed, there exists ■ control arising partly from the public opinion of the living, and more largely from the public opinion of the dead.” Thus it is tradition passing on from one generation to another that originally governed human conduct. This tradition is custom.

(2) LOCAL CUSTOM AND GENERAL CUSTOM

Custom distinguished from Common Law :—Legal custom is divisible into two classes local custom and general custom. The general custom of the land is known in England as the common law. It arose as the custom of the king's courts and consists of judicial precedents. The received theory in England for ■ long time was that these judicial decisions were declaratory of the common customs of the realm. This general custom should be distinguished from local custom. A local custom prevails only in ■ defined locality, while general custom is operative throughout the realm. When the

(1) ■ E. R. 516

world custom is used *simplicitor* it refers to local custom. It is defined as follows in Halsbury's laws of England: "A custom is a particular rule which has existed either actually or presumptively from time immemorial, and has obtained the force of law in a particular locality, although contrary to or not consistent with the general common law of the realm"¹.

While the common law is the law of the realm, a custom is law only for a particular locality. A custom is confined to particular places and cannot extend to the whole realm or embrace all the subjects of the sovereign. As it is put in Coke on Littleton: "A custom cannot be alleged generally within the Kingdom of England: for that is the common law"

"Every Custom" say Prof. Allen, "is in some fundamental respect an exception from the ordinary law of the land. Second, every custom is limited in its application. It does not apply to the generality of citizens but only to a particular class of persons or to a particular place."² Common law, on the other hand, applies to the subjects generally and is the ordinary law of the realm.

(3) LEGAL CUSTOM AND CONVENTIONAL CUSTOM

Custom distinguished from usage :—A legal Custom is one which possesses in itself the force of law. A conventional custom, on the other hand, has no such absolute authority. Its authority is dependent upon prior acceptance by the parties sought to be bound by it. Usually a conventional custom is referred to as *usage* and legal custom as custom *simplicitor*.

The features of distinction between customs and usages may be noted here. A custom is binding irrespective of the consent of the parties to be bound thereby. Usages are binding only when they are not expressly excluded by the terms of the agreement entered into by the parties. In the first place, as will be observed *infra*, custom to be valid should have existed from time immemorial but immemorial antiquity need not be shown in regard to usages. Usages of recent origin can also be given effect to by courts on the ground that the parties had contracted with reference to that usage. Secondly, custom when it is local can freely derogate from the general or common law (*jus commune*) of the realm, though not from the statute

(1) Halsburys Laws Vol. 10, p. 2.

(2) Allen: Law in the Making p. 87.

law. Usage, however can do so only to the extent to which it is possible to exclude the common law by specific and express contract between the parties. If in any particular the common law cannot be excluded by express agreement, it cannot be excluded by usage either, but custom can override the common law.

The law Merchant:—The law merchant is the accumulated product of the merchants (*Consuetudo mercatoria*) to which sanction has been given by decisions of courts. The law of negotiable instruments before it was embodied in statute was a part of the law merchant. The law merchant is conventional custom. Its law creating efficacy is dependent upon the fact that it has met with acceptance extensively among traders that courts will be prepared to construe their contracts in the light of the law merchant and import into the contracts implied conditions based upon mercantile usage. Any principle which can be introduced by express agreement can also be introduced in this way by means of the law merchant. The law merchant is not a permanently fixed and stereotyped body of law. The exigencies of trade are continually expanding and the courts of the country are usually not slow in according recognition to the expedients devised by traders for satisfying them.¹ If any part of the general law is absolute and admits of no contract to the contrary, it cannot be impaired by the law merchant. This is because the law merchant is only a conventional custom and can only operate by way of an implied agreement. What cannot be done directly by express agreement cannot be done indirectly by setting up a mercantile custom.

(4) CUSTOM AND PRESCRIPTION

Custom distinguished from Prescription:—A claim to legal rights may be asserted on the basis of custom as well as prescription. Long continued, and peaceable user is the incident common to the two. The point of distinction lies in the circumstance that "whereas prescription is fixed in the person and therefore ought always to be laid in persons, a custom is *lex loci* and inherent in the soil whereto it is fixed for the service of every one that is qualified to use it." A claim is based upon custom when it depends on a general rule of property within the particular locality, applying equally to all persons of a given class resident within the limits of that locality. A pres-

(1) See *Goodwin v. Roberts* (1865) 10 EX. 337 (Per Cockburn C. J.)

criptive right, on the other hand, is personal to the claimant. The limitation of reasonableness which, as we shall see, applies to customary rights has no application to claims based on prescription.

(5) ORIGIN OF CUSTOM

(A) SAVIGNY'S THEORY

Custom traceable to Volksgeist :—The German Historical School of which Savigny was the leading exponent traces custom to the *Volksgeist* or genius of the people. Custom is regarded as the embodiment of those principles which have commended themselves to the national conscience as principles of truth, justice and public utility.

Prof. Allen's Criticism :—Prof. Allen rejects the view of the German historical school and maintains that it is impossible to attribute all customs to the general conviction among the community as to their necessity rectitude and appropriateness. Not infrequently customs are found to have arisen from the convenience or interest of a ruling class whose will is imposed on the majority of the people. As Prof. Gray says: "Law was brought in not only without the wishes, but against wishes of the great mass of the people". Again, customs are *local* having nothing to do with the national will. These local customs sometimes differ from one another in the same country, thus negating the notion that the influence which originates a custom is peculiarly popular or national. Further, custom arises by the force of example rather than by the impulse of reasoned conviction and it is by imitation that its rapid and widespread adoption is rendered possible. As Prof. Allen observes: "This imitative fascination which is of obscure psychological origin, but is based upon the necessity for the individual to follow the line of least resistance in conforming to the ordinary circumstances of his environment has been underrated in current theories as to the compulsive force of custom".¹

Conclusion :—The theory of Savigny [that custom owes its origin and obligatory force to the general conviction or consciousness of the people is thus untenable.] His doctrine, however, contains a substratum of truth. It focusses attention on the fact that law is not an arbitrary mechanical creation, but a live organic force whose origins are to be sought in sociological elements.

(1) Allen : *Law in the Making* P. 104

(B) MAINE'S THEORY

Custom originates in Judicial practice:—According to Sir Henry Maine custom arises as ■ result of decisions or *themistes* succeeding one another and laying down an identical rule of conduct in a series of similar cases. “The germ or rudiment of ■ custom”, he says, “is ■ conception posterior to that of Themistes or judgments. However strongly we, with our modern associations, may be inclined to lay down *a priori* that the notion of a custom must precede that of a judicial sentence, and that ■ judgment affirm a custom or punish its breach, it seems quite certain that the historical order of the ideas is that in which I have placed them.” Jethrow Brown also says : That custom is often posterior to judicial decision is another fact about which no difference of opinion is possible. Under the pretence of declaring custom, judges frequently give rise to it”¹.

Vinogradoff's criticism :—This theory has not passed without challenge. Sir Paul Vinogradoff points out in his ‘*Historical Jurisprudence*’ : “Social customs themselves obviously did not take their origin from an assembly or tribunal. They grew up by gradual process in the household and daily relations of the clans, and the magistrate only came in at a later stage, when the custom was already in operation, and added to the sanction of general recognition the express formulation of judicial and expert authority”.

The question as to how far judges can originate law will be discussed fully under another topic². Assuming that judges can create law, that would be *judiciary law* and not customary law which *ex hypothesi* is made by popular practice. Here it is sufficient to observe that there is in Maine's theory an element of truth which consists in the fact that custom is in some degree moulded and and modified by judges.

(C) CONCLUDING REMARKS

The true view as to the formation of custom seems to be the following. A practice is selected from among different alternatives and is spontaneously followed. If it is found to be good and useful, it is naturally copied over and over again, the more so as habit and association usually render the imitation of an old and familiar practice easier than inventing a new and untried one. A generally observed

(1) *Jethrow Brown : Austinian Theory of Law*, p. 308.

(2) See Chapter, XXXVI.

course of conduct thus emerges and becomes established custom.

(6) GROWTH OF CUSTOM

Three historical stages :—Law having its origin in custom usually passes through three successive historical stages. In the first stage, the custom has to be proved before a court acts upon it. Custom is proved like any other fact. It may be proved by witnesses who have knowledge of its existence and exercise without dispute¹. In the second stage, judicial notice is taken of the custom. Once it is judicially recognised, it is not necessary to prove it, for it must be taken to have become part of the local law of which the court takes judicial notice².

The third and final stage of historical development is attained when the law having its original source in custom and its secondary source in judicial decisions is embodied in a legislative enactment and thus converted into enacted law.

(7) REQUISITES OF A VALID CUSTOM

Not every usage prevailing in society is enforced by a court of law. It is only when the usage conforms to certain criteria of validity adopted by the judges that it is recognised as having the force of customary law. The tests which a custom has to satisfy before it is recognised as law by the courts are the following :

(a) Antiquity:—A custom to be valid must be immemorial. According to Blackstone, "A custom in order that it may be legal and binding, must have been used so long that the memory of man runneth not to the contrary. So that if any one can show the beginning of it, it is no good custom".³ This statement requires some qualification. English law has set an arbitrary but necessary limit to 'Legal memory' fixing it at 1189 A.D., the year of the accession of Richard I. A custom cannot, therefore, be impugned by showing an origin prior to 1189.

If a practice is proved to have been in existence from the commencement of legal memory, it is accepted as a valid custom. Since such proof is not within the reach of evidence the judges have

(1) *Ahmad Khan v Chamu Bibi*, 6 Lah, 502 (P.C.)

Sugan Chand v. Mangibai, I. L. R. (1942) Bom. 467.

(2) *Dasarathlal v. Bai Dhondubai*, I. L. R. (1941) Bom. 460.

(3) *Blackstone : Commentaries*, P. 76.

provided a remedy "by holding that if the proof was carried back as far as living memory would go, it should be presumed that the right claimed had existed from the time of legal memory, that is to say, from the time of Richard I".¹

In India too a custom to be valid should be ancient. The technical rule of English law as to legal memory has, however, no application to India. Jayakar, J., delivering the judgment of the Judicial Committee in *Mt. Subhani v. Nawab*², observed thus: "It is undoubted that a custom observed in a particular district derives its force from the fact that it has, from long usage, obtained in that district, the force of law. It must be ancient: but it is not of the essence of the rule that its antiquity must in every case be carried back to a period beyond the memory of man—still less that it is ancient in the English technical sense. It will depend upon the circumstances of each case what antiquity must be established before the custom can be accepted. What is necessary to be proved is that the usage has been acted upon in practice for such a long period and with such invariability as to show that it has, by common consent, been submitted to as the established governing rule of the particular district". In a later case, Sir George Rankin said: "In India, while a custom need not be immemorial, the requirement of long usage is essential since it is from this that custom derives its force as governing the parties' rights in place of the general law"³.

(b) **Reasonableness** :—A custom must be reasonable. Littleton says of customs: "Whatsoever is not against reason may well be admitted and allowed." Since a widespread practice may be presumed to have a rational basis in utility and convenience, it is for the party disputing a custom to satisfy the court of its unreasonableness. As Prof. Allen says: "The true rule seems to be not that a custom will be admitted if reasonable, but that it will be admitted unless it is unreasonable"⁴. The period for ascertaining whether a custom is reasonable is "the period of its inception"⁵.

A custom then should not be repugnant to reason. This 'reason' however, as Sir Edward Coke points out, "is not to be understood

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- (1) *Angus v. Dalton*, (1877) 3 Q.B.D. 85. (per Cockburn, C.J.)
 - (2) *I.L.R.* (1941) *Lah*, 154 (P.C.)
 - (3) *Baba Narayan v. Saboosa*, (1943) 2 *M. L. J.* 186 at 189.
 - (4) *Allen: Law in the Making*, P. 92.
 - (5) *Mercer v. Denne*, (1905) 2 CH 534; followed in *Asrabulla v. Kiamatulla*, (1937) CAL 245.

of every unlearned man's reason but of artificial and legal reason warranted by authority of law : *lex est summa ratio.*"¹ The reasonableness of a custom should be judged with reference to the general principles which are at the root of the legal system. A custom is contrary to reason if it is opposed to the principles of justice, equity and good conscience.

By the test of reasonableness a reserve power is lodged in the court to discountenance or abrogate a pernicious custom. It should not, however, be supposed that courts have unrestrained liberty to disallow a custom whenever they are not thoroughly satisfied that it represents the perfection of wisdom. Courts should not lightly reject an established usage and overthrow the expectations and arrangements based on the supposition of its continuing legal validity. A custom can be refused recognition only when it is opposed to public policy and is manifestly repugnant to right and reason. As Salmond points out, before a custom is denied legal efficacy, it must be found that the mischief resulting from its enforcement outweighs the detriment that would result from a nullification of the natural expectation that an established usage would have continuance in the future.

The rejection of a custom on the ground that it is opposed to public policy is not an uncommon occurrence in India. For instance, in *Raja Varma v. Ravi Varma*: 1 Mad 235 (P. C.) the question arose whether a custom recognizing the sale of the trusteeship of a temple was a valid custom. Sir James Colvile, delivering the judgment of the Judicial Committee observed: "If the custom set up was one to sanction not merely the transfer of the trusteeship, but, as in this case the sale of ■ trusteeship for the pecuniary advantage of the trustee, they would be disposed to hold that that circumstance alone would justify a decision that the custom was bad in law".

(c) **Compulsory observance** :—A Custom to operate as a source of law must be supported by *opinio necessitatis*. It must be regarded by those affected by it not merely as a facultative or optional rule, but as an obligatory or binding rule of conduct. If ■ practice is left to individual choice it can have no claim to recognition as Customary law. Before accepting a custom as a binding source of law the Court should be satisfied that in that Custom is crystallised the

(1) *Co. Litt* : 62 A.

unmistakable conviction of the community as to the rights and obligations of its members towards one another.

As Blackstone says :—"A custom that all the inhabitants shall be rated towards the maintenance of a bridge, will be good, but a custom that every man is to contribute thereto at his own pleasure, is idle and absurd and indeed no custom at all."

(d) Conformity with Statute law :—A custom to be valid should not be in conflict with Statute law. This is because a statute can abrogate a custom and custom must necessarily yield where it conflicts with statute. If a statute conflicts with a pre-existing custom, the latter is automatically abrogated.

The Roman law was different. It recognized not only *consuetudo* (custom) but *desuetude* (disuse). In the *Corpus Juris* of Justinian several statutes are mentioned as having fallen into disuse. In ancient Greece and in Scotland also a statute might go into disuse by a posterior contrary custom.

The English law, however, is different. Allen observes in his *Law in the Making*¹ : "Age cannot wither an Act of Parliament, and at any time, so far as I am aware, has it ever been admitted that a statute might become inoperative through obsolescence".¹ The Indian law also is to the same effect. So to be an operative source of law custom should not come into conflict with statute law.

PROOF OF CUSTOM

The four tests mentioned above should be satisfied before a custom is accepted as valid by a court. A few other principles borne in mind by courts in this connection are given below. They have a bearing on proof of the actual existence of the custom.

(a) Continuity :—A custom to be valid must have continued without interruption since time immemorial. An interruption within legal memory defeats the custom. In *Mt. Sadhan v. Pratap Narain* a custom was set up that the houses and shops constructed by the raiyats in the village *abadi* could not be transferred without the landlord's permission. It was held that the custom was negatived by proof of the existence of transfers made without the landlord's permission or objection. Lack of continuity raises a presumption that there never was any such custom at all.

(1) Allen : *Law in the Making*, p. 393

(2) (1941) *Oudh* 401.

(b) Peaceable enjoyment :—A custom must have been peaceably enjoyed. The reason for this is thus given by Blackstone : “ As customs owe their origin to common consent, their being immemorably disputed, either at law or otherwise, is a proof that such consent is wanting”. So uncontested assertion of rights under a custom is a very good proof of the existence of the custom. In *Mahamood Hussain v. Abdul Huq*¹. Mr. Justice Mockett observed : “ I am unable to understand that the fact that the operation of a custom has not been resisted can be used as an argument that such a custom did not exist”.

(c) Certainty :—Custom to be a source of legal rights should be definite. Like the tests of continuity and peaceable enjoyment this test goes to the proof of the existence of the custom. In *Guruswami Raja v. Perumal Raja* : (1929) Madras 815, a customary easement was claimed to cast on the lands of neighbours the shadow of overhanging trees. Pandalai J., said : A custom has to be definite to begin with. How can there be any custom for the shadow of overhanging trees to fall upon a neighbour's, land ? The thing is so indefinite and so vague and changes from day to day and year to year that there can be no such general custom either in a particular locality or throughout the country”.

(9) THEORIES OF CUSTOMARY LAW

Customary law, as we have seen, is established not by legislators or professionally trained judges, but by popular practice. As to the obligatory force of custom and as to its place among the sources of law, eminent jurists have taken divergent views.

(A) THAT CUSTOM IS THE FORMAL SOURCE OF LAW

View of the 'Historical School :—The German historical school, of which Savigny and Puchta are illustrious representatives, holds the view that custom is the primary source from which all law derives its legal efficacy and authority. In other words, custom is to be regarded as the formal source of law. This view is powerfully voiced by James Carter in his '*Law, its origin, growth and function.*' He observes thus : “ What has governed the conduct of men from the beginning of time will continue to govern it to the end of time. Human nature is not likely to undergo a radical change and therefore

(1) (1942 1. M. L. J. 561 at 569.

that to which we give the name of law always has been, still is, and will for ever continue to be custom"¹.

In this view a judicial precedent is law only because it is authenticated custom. "A judicial precedent is not law *per se*, but evidence of it only. The real law is custom"¹. Legislation too, according to this theory, cannot create law, for it only "supplements and aids the operation of custom and never supplant it." According to Savigny, "Customary law may be complete, modify or repeal a statute; it may create a new rule and substitute it for the statutory rule which it has abolished."

Custom is thus regarded as the mainspring of all law or, in other words, as the 'Formal source' of law. Manu has also said that "Custom is transcendent law."

Savigny goes so far as to maintain that custom is the sole source of law. He says: "The foundation of the law has its existence, its reality in the common consciousness of the people...—...We become acquainted with it as it manifests itself in external acts, as it appears in practice, manners and custom. Custom is *the sign or badge of positive law, and not its foundation or ground of origin.*" To the obvious objection that at the present day the law-making power of the people as such is little in evidence, Savigny answers: "In course of time, when law is developed in its details, it can no more be mastered by the people generally. A separate class of legal experts is formed which, itself an element of the people represents the community in this dominion of thought."

According to Savigny, therefore, custom is the type of all law and law is valid and just only in so far as it makes known and objectifies in concrete forms the true legal instincts of the community which it purports to govern.

Criticism :—The view of the historical school cannot stand close scrutiny. The assumption that it is custom that gives authority to precedent and statute is unfounded. In fact custom cannot be put on the same level as statute in point of the legal efficacy. A custom is not itself binding. It has to satisfy certain judicial tests before it is accepted as binding law. For instance, a custom to have legal force must be reasonable and based on long and continuous usage. A statute, on the other hand, is binding however unreasonable it might be and even though it might have fallen into desuetude for a long time.

(1) Carter : *Law, its origin, growth and junction*, P. 120.

Further, a statute can abrogate a custom but not *vice versa*. It is thus clear that custom and statute are not co-equal in point of authority. To say then a statute derives its authority from custom or that custom is the sole source of law is simply to fly in the face of facts.

(B) THAT CUSTOM IS A HISTORICAL MATERIAL SOURCE

Austin's view :—Austin is the chief exponent of ■ theory of customary law according to which custom derives its binding force not from its own nature, but by state recognition, that is, when it is adopted by an Act of Parliament or its validity has been established by ■ judicial decision. According to him, "A customary rule may take the quality of a legal rule in two ways:—It may be adopted by a sovereign or subordinate legislature and turned into ■ law in the direct mode (statute law) or it may be taken as a ground of a judicial decision, which afterwards obtains as a precedent and in this case it is converted into ■ law after the judicial fashion. In whichever of these ways it becomes a legal rule, the law into which it is turned emanates from the sovereign."

According to Austin, custom has only persuasive value. Customary practices have to be recognised by courts before they can become law. For the decision of a case, if no statute governs the facts, the judge may look for guidance where he pleases. Custom is one quarter where he may seek the law. He may or may not, in his discretion, follow it. Thus custom has only persuasive efficacy and is not law until it has been pronounced upon by the court. In other words, custom is ■ persuasive or historical material source of law.

"Law styled customary," says Austin, "is not to be considered distinct kind of law. *It is nothing but judiciary law founded upon anterior custom.*"

Criticism :—That Austin's theory also cannot hold water will be apparent on ■ closer consideration of the true nature of custom. It is no doubt true that customary rules are laws only because they are recognised as laws by the state or its judicial tribunals. But Austin is seriously in error when he dates the state recognition only from the moment that the usage has been called in question and allowed to be good in a court of justice.

Prof. Allen says : "The fallacy of the Austinian doctrine is in supposing that custom is not law until it has been pronounced

upon by a court. The exact reverse is the truth. Custom is the first and most essential law.”¹ Again, he observes: “Ancient customs are still an integral part of modern law and the courts frequently have to deal with them. Do they deal with them *as law* or as something which, existing *de facto*, may be turned into law by *ex cathedra* sanction? I conceive the former proposition to state the true principle”². Custom, then, is enforced by courts because it is already law; it does not become law only on enforcement by courts. Prof. Allen’s statement is to be understood with one qualification. It is not every popular practice that has the force of law. A custom has to satisfy certain tests before it is enforced by courts. Dr. Holland’s view to which we may now turn draws pointed attention to this.

(C) THAT CUSTOM IS A LEGAL MATERIAL SOURCE

View of Holland and Salmond :—Holland says that binding authority is conceded to custom provided it fulfils certain requirements, the nature of which is now settled beyond a doubt. Judges are bound to enforce a custom that satisfies the criteria of validity prescribed by the law. As Holland says: “When a given set of circumstances is brought into court and the court decides upon them by bringing them within the operation of a custom, the court appeals to that custom as it might to any other pre-existent law. It does not as Austin holds, *proprio motu* then for the first time make that custom a law; it merely decides as a fact, that there exists a legal custom, about which there might up to that moment have been some question, as there might about the interpretation of an Act of Parliament”³.

Holland, therefore, holds that the authority of custom arises not because it has been recognised by the courts but because it will be so recognised in accordance with pre-determined rules of law, if the occasion arises. Custom is thus a legal material source of law. Salmond is in agreement with this view.

Jethrow Brown’s Criticism :—Jethrow Brown, who subscribes to the Austinian view as to the nature of customary law, is of the opinion that the fact that a legal custom should be reasonable and has to satisfy certain tests laid down by judges is fatal to the view

(1) Allen : *Law in the Making* p. 84.

(2) Allen : *Law in the Making*, p. 87.

(3) Holland : *Jurisprudence*, p. 62.

that a custom is anything more than a persuasive source of law. He observes: "There are real difficulties in the way of calling customs as such, laws. Tests exist for deciding what customs are to determine or influence judicial action, but the writers who tell us what these tests are, differ from one another in important respects. The use, moreover, which judges make of the tests, and the important role which the argument based on convenience plays in the judicial trials where customs have been approved, tend to confirm a suspicion of the existence of a fundamental difference between the attitude of the judges in dealing with custom, and the attitude in dealing with sources of law which are undoubtedly binding".¹

Criticism answered:—Jethrow Brown recognises that a judicial precedent, indisputably a binding source of law, is itself liable to be scrutinised on the ground of reasonableness. *Cessante Rationae Legis Cessat Lex ipsa* is the maxim of the law. An unreasonable precedent may be overruled by a higher judicial authority. Dr. Brown realises this, but proceeds to observe: "I do not think, however, that it would be difficult to establish a real difference in modern judicial administration between the application of a precedent and the application for the first time of a popular custom—a difference that, as regards the test of reasonableness, for example, might be expressed by saying that precedent binds unless obviously unreasonable, while a custom must be proved positively to be reasonable and in accord with public convenience." We have already indicated, however, that the better opinion is that the onus is upon the party impugning a custom to show that it is unreasonable². The distinction between a custom and a precedent attempted by Dr. Brown is thus inadmissible and his whole reasoning based thereon has, therefore, to be rejected.

Conclusion:—It is submitted that Salmond's view may be accepted as representing the true nature of custom. Custom becomes law whenever it in fact satisfies the conditions prescribed by the law necessary for its validity. If proof of this is forthcoming, courts must affirm the validity of the custom. Such a custom is called legal custom.

Legal custom then supplies principles to which the will of the state is bound to give legal force. It is therefore to be ranked as a legal material source of law. Indeed, the standard definition of

(1) Jethrow Brown: *Austinian Theory of Law*, p. 324

(2) See p. 284.

custom *strictu sensu* represents it as nothing less than fully valid or operative law. The definition is : "A custom in the intendment of the law is such a usage as hath obtained the force of law and is as such a binding law to such particular places, persons or things, which it concerns.....But it is *jus non scriptum* and made by the people only of such places where the custom is."

(10) IMPORTANCE OF CUSTOMARY LAW

In early times:—Custom was the sole source of law in early times. In a modern society the principles of social conduct which commend themselves to public opinion find expression in laws, that is legislative enactments. In primeaval times when society lacked the legislative mechanisms familiar to the modern state, these principles manifested themselves in the form of customs approved by public opinion. As Salmond rightly observes : "*Custom is to society what law is to the state.*"¹ There is functional identity between customs and laws. No wonder then that in the infancy of political societies states give immediate recognition to the customs prevalent upto that period and the laws conform to the prevailing customs. Modern states, however, aspire to reform customary law or to supplant it altogether,

Present position of customary law:—Even to-day we find that the material contents of developed systems of law have been supplied to a large extent by custom. As Prof. Allen observes : "The legal rules as to whether all children should share in the succession of the father, or whether males should inherit land to the exclusion of females or whether the eldest or the youngest should come to the hearth and landed estate have been evolved from the early customary rules." In fact the personal law of the Hindus is at present customary law which has been recognised by judges and embodied in judicial decisions.

The law-creative efficacy of custom is now on the decline and may even be regarded as having exhausted itself. One of the tests to be satisfied by a valid custom is that it should be ancient. In England a valid custom must have had its origin at least as far back as 1189. It is thus clear that custom is not at the present day a living and operative source of law. Other agencies of legal evolution or processes of law-making have eclipsed custom in importance and to these we shall turn our attention in the next two chapters.

(1) *Salmond Jurisprudence* p. 202.

CHAPTER XXXVI

JUDICIAL PRECEDENT

(1) DOCTRINE OF PRECEDENT OR STARE DECISIS

English rule of Stare Decisis:—Judiciary law owes its importance to the doctrine of precedent. It is a fundamental principle of judicial practice in the British Empire and in the United States that the decision of a court, quite apart from its intrinsic merit, should have binding force on judicial tribunals. Judicial decisions become binding precedents for the determination of like cases in the future and so contribute to the material content of the legal system.

Adherence to precedent is necessary if litigants are to have faith in the even-handed administration of justice and the legal system is to attain to any degree of certainty. Blackstone says: "For it is an established rule to abide by former precedents, where the same points come again in litigation: as well as to keep the scale of justice even and steady and not liable to waver with every new judge's opinion, as also because the law in that case being solemnly declared and determined, what before was uncertain, and perhaps indifferent, is now become a permanent rule, which it is not in the breast of any subsequent judge to alter or vary from, according to his private sentiment..."¹.

Continental practice different:—In continental Europe, however, the doctrine of precedent has not been firmly established. There jurists insist that a judicial decision cannot *per se* claim any legal authority or binding force. Between the English and the Continental law there exists in this respect a radical distinction the cause of which Prof. Gray considers to be "one of the unsolved problems of comparative jurisprudence"². We may observe that the explanation for the divergence on this point between the English and Continental practices is to be sought in the circumstance that the Continental countries have been more profoundly influenced than England by the theories of Roman law. One of the constitutions

(1) Blackstone : *Commentaries* I, p. 69.

(2) Gray: *Nature and Sources of the law*, P. 212.

of Justinian provides : "No judge or arbitrator is to consider himself bound by juristic opinions which he considers wrong : still less by the decisions of learned prefects or other judges. For if an erroneous decision has been given, it ought not to be allowed to spread and so to corrupt the judgment of other magistrates. Decisions should be based on laws, not on precedents". This doctrine lies at the root of the Continental practice. For instance, Article 5 of the French Civil Code provides thus : "Judges are forbidden, when giving judgment in the cases which are brought before them, to lay down general rules of conduct or decide a case by holding it was governed by a previous decision". It, however, appears that even on the Continent, though a single precedent may not have the force of law, a course of judicial decisions, that is, precedents repeated so as to give rise to a line of authority, is recognised as a form of law.

Precedent as a source of law :—If a judicial precedent speaks with authority, the principle which it embodies would be binding in future cases. It thus becomes a source of law. Many precedents, we may observe, are only declaratory, that is, involve the application to a given set of facts of rules of law already in existence. Even so a precedent is, source of law, for one need not look beyond it to justify its legally authoritative character. Some precedents may also be *creative* of law for the principles which they embody may be original and so new to the legal system. Here, however, we are on controversial ground for some jurists deny that judicial precedents can be other than declaratory or illustrative of existing law. We shall, therefore, proceed to consider the true nature of the judicial process in some detail.

(2) THEORIES OF JUDICIARY LAW

(A) THE DECLARATORY THEORY OF PRECEDENTS

Blackstone's Theory :—According to Blackstone, "A Judge is sworn to determine, not according to his own private judgment, but according to the known laws and customs of the land ; not delegated to pronounce a new law, but to maintain and explain the old one *jus dicere et non jus dare*"¹. The function of the judge is thus to discover in the existing rules of law the particular principles that govern the facts of individual cases. Judges are thus, it is said, law-finders rather than law-makers.

(1) *Blackstone : Commentaries* I. P. 69.

Of this theory of judicial incompetence to create law, propounded by Blackstone, who was himself ■ great judge, the staunchest supporters have been the judges themselves. For instance, Lord Esher says in *Willis v. Baddeley*¹. “There is in fact no such thing as judge-made law, for the judges do not make the law, though they frequently have to apply existing law to circumstances as to which it has not previously been authoritatively laid down that such law is applicable”.

Bentham's criticism:—Bentham has characterised the orthodox theory that judges only declare the law as “a wilful falsehood having for its object the stealing of legislative power by and for hands which could not or durst not, openly claim it”. His disciple, John Austin, has also inveighed against “the childish fiction employed by our judges, that judiciary or common law is not made by them, but is a miraculous something made by nobody, existing, I suppose, from eternity and merely declared from time to time by the judges”². An eminent American jurist, Munroe Smith, also considers that the orthodox official theory cannot be taken seriously. He says: “The fact that English Common Law has never had any existence except in decisions ; that by decisions it has been developed in historical times from scanty beginnings into ■ great and complex system ; that by decisions its rules have continually been modified and frequently overruled, these facts have been more cogent to the average mind than any official theory”³.

Dr. Carter's support for the theory :—Blackstone's theory of judiciary law found a powerful supporter in James Carter. In *Law, its Origin, Growth and Function*, “this distinguished American jurist observes : “ If what the Judges did was to declare a law not before existing the subjection by them of one of the parties to liability for an infraction of the law, in a transaction occurring before the existence of the law, would be an indefensible outrage. Any one who undertakes to support Austin's theory encounters here an ugly dilemma ; the law by which the judge makes a decision either existed at the time of the transaction involved in the case, or it did not, and was made by the judge ; if it did exist, the judge did not make it—If it did not exist at the time of the transaction, then what the judge has done and the

(1) (1892) 2Q. B. 324 at 326.

(2) *Austin: Jurisprudence*, 655.

(2) *Munroe Smith: A General View of European legal History*, p. 298.

sovereign ratified is to compel a man to suffer for the violation of a law committed before the law was made. No theory of law can stand which involves such a consequence"¹.

Criticism :—To suppose as Dr. Carter does, that all judicial decisions are and must be merely declaratory of existing law involves the assumption that law is of infinite range and provides for every conceivable case beforehand. But Bacon said long ago that "The narrow compass of human wisdom cannot take in all the cases which time may discover." There frequently arise novel cases or cases of first impression which the judge has to decide without the assistance of any pre-determined legal rule. The principles laid down by learned judges in such cases are bound to be a distinct contribution to the existing law. Dr. Carter does not concede this. In his view "What is really done in a novel case is the same thing that is done in every disputed case. The features of the transaction are subjected to scrutiny in order to determine to what class it belongs. The classes are not made; they *exist* in existing custom."² Why we should suppose that the "classes" are not made is not easy to understand. There is abundant material in the law reports to show that judges can and do bring into existence legal notions not conceived of before. The decision of the House of Lords in *Rylands v. Fletcher*³, for instance, created a new species of absolute liability. If a person caused injury to another owing to an accident which he could not avoid by the exercise of the degree of care that the law requires from the average man, he could not be held liable for it. The plea of inevitable accident was recognised as a valid defence to the injured person's action for damages. *Rylands v. Fletcher*, however, brought into existence a general exception to this rule. It decided that if a person kept admittedly dangerous property on his premises, he was liable for all harm that ensued by its escape therefrom, although an inevitable accident had rendered such escape possible. It can hardly be suggested that this decision did not create a new category of absolute liability. Again, the whole body of Equity jurisprudence bears eloquent testimony to the purposeful activity of judges as law-makers. The rules of Equity are to a great extent professedly in opposition to the pre-

(1) Carter : *Law its origin, Growth and Function*, p. 185.

(2) Carter : *Law its origin, Growth and Function*, p.192.

(3) *Rylands v. Fletcher* L. R. 3 H. L. 330.

existing legal rules. We can trace the Chancellors who have given them birth, nurtured them and brought them to maturity. Legal principles are not eternal or immutable and do undergo ■ progressive modification in the hands of judges. The serious defect of the declaratory theory of law is that it overlooks the important fact that “Judges reveal in their judgments not merely the influence of ancient and established ideas and beliefs, but also the influence of a Time-spirit, thereby giving expression to rules which are new, both in the sense that they have not found expression in an earlier case and in the sense that they could not have done so”¹.

If judges do make law, since they apply it to the facts of the case on hand, there can be no doubt that the law made by them is *ex post facto*. This may be a defect of judiciary law but we cannot ignore or deny, as Dr. Carter does, the law making power of judges simply because by its exercise controversies are decided by means of rules which were not in existence and so not knowable by the parties when the causes of the controversy arose.

Carter's theory : Logically rebutted :—Carter's argument may be stated in the form of a complex constructive dilemma as follows :

Major Premise :—If ■ judge applies a pre-existing legal principle he only declares the law ; if a judge applies ■ new legal principle, he commits an injustice.

Minor Premise :—A judge either applies a pre-existing legal principle or a new one.

Conclusion :—A judge either declares the Law or commits ■■ injustice.

This dilemma can be taken by the horns. The major premise that if ■ new legal principle is applied, there is necessarily an injustice is not invariably true. All retroactive laws are not necessarily unjust. One has to examine the substance of the law before one can pronounce it as unjust.

(B) THEORY THAT JUDGES ARE LAW MAKERS

Dicey's view :—Dicey in his remarkable book, '*Law and Opinion in England*,' observes thus : “As all lawyers are aware, a large part and, as many would add, the best part of the law of England is Judge-made law—that is to say, consists of rules to be collected from the judgments of the courts. This portion of the law

(1) *Jethrow Brown : Austinian Theory of Law Excursus* (C)

has not been created by Act of Parliament and is not recorded in the Statute-book. It is the work of the courts; it is recorded in the Reports; it is, in short, the fruit of judicial legislation"¹.

Gray's extreme View :—The best jurisprudential writers have now generally recognised the reality and the efficacy of judicial legislation and thoroughly discredited the declaratory theory of judiciary law. An American writer, Prof. Gray, indeed goes to the extreme length of contending that judges *alone* are makers of law. After quoting Bishop Hoadly² as saying, "Whoever hath an absolute authority to interpret any written or spoken laws, it is *he* who is truly the *Law-giver* to all intents and purposes and not the person who first wrote or spoke them," Prof. Gray remarks : "*a fortiori*, whoever hath an absolute authority not only to interpret the law, but to say, what the law is, is truly the Law giver"³.

Qualifications to the theory :—When it is said that judges can make law, it is not to be understood as saying that judges enjoy an unrestricted power of laying down abstract principles of law.

It is necessary to bear in mind that the judge's law-making power is strictly limited. For instance, the judge cannot overrule a statute. Where a statute has clearly laid down the law, the judge has to enforce it, leaving it to the legislator to deal with any unpleasant consequences not foreseen at the time when the statute was passed. Authoritative precedents also limit the law-making power of the judge for he cannot depart from the established line of authority. Further, the judge's legislative power is restricted to the facts of the case before him. Any ruling which he may lay down will be law only in so far as it is necessary for the decision of the case. This is known as the *ratio decidendi*. Any principles laid down by a judge which do not form the ground of his decision and which are not applicable to the case under consideration are only *obiter dicta*. Such dicta have no binding authority. As Lord Halsbury observes in *Quinn-v-Leathem*.³ "A case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it. Such a mode of reasoning assumes that the law is necessarily a logical code, whereas every lawyer must acknowledge that the law is not always

(1) *Diecy: Law and opinion in England*: p. 361.

(2) *Gray: Nature and Source of the law* p. 102.

(3) (1901) A. C. 495 at 506.

logical at all.” Thus the judge is confined to the facts of the case in enunciating legal principles. Within such limits alone can it be said that judges make law.

(C) CONCLUSION

Origin of the declaratory theory ;—From what has already been said on the subject it is clear that Blackstone’s theory of the judicial office according to which judges can make no new law is only a fiction. In its origin perhaps this fiction might have served some useful purpose. An open profession by the judges to apply new law might have made them unpopular. Unsuccessful litigants might submit with resignation to what is declared to have been the law of the land, when they would have rebelled against a decision avowedly applying new law. The judges also, being naturally conservative, seem to have adopted this fiction so as to guard against unwise innovations and to preserve the element of certainty in law. Such perhaps were the reasons for which this fiction was originally resorted to, but of course an explanation of its origin is not a justification of it. If we are to attain to a sound theory of the nature of judiciary law and the true operation of precedents it is necessary to reject the fiction that the duty of the judge is only to expound pre-existing law.

Limits of judicial legislation :—That judicial legislation has well-defined limits is a proposition that cannot be gainsaid. The primary function of the judge is not to make law, for that is the prerogative of the legislature. His concern is not with the future consequences of the rules he is laying down, but with the application to the case on hand of what he conceives to be the law. So much so, Prof. Allen has said: “The judge cannot, however much he may wish to do so, sweep away the prevailing rule of law and substitute something else in its place. In this sense it is no ‘childish fiction’ to say that he does not and cannot ‘make’ law. The Legislature, on the other hand, has an entirely different prerogative. It is not confined to law in the present or the past, but may do as it wills with the future. It can ‘make’ new law in a sense which is quite precluded to the judge. It legislates where the judge interprets. The legislature can at any time project into the future a rule of law which has never existed in England; the courts can do nothing of this kind”¹

(1) Allen: *Law in the Making* : p, 174.

Scope of judiciary law :—It is thus clear that within certain limits judges have the power of profoundly influencing the system of law and contributing to its substance. Even if they do not 'make' law in the sense of promulgating at will whatever rules of human conduct might commend themselves to them as proper, it must be acknowledged that they develop the law. The personal stamp of the great judge is upon every legal system. Who can deny that the personality of Papinian and Tribonian has entered into the Roman law? The stamp of Coke and Mansfield, is indelibly imprinted on English law. Marshall is undoubtedly the creator of much that has stood the test of time in the American constitution. Muthuswami Ayyar, to mention only one name, stands out as personally responsible for things of the first moment in Indian law. By removing ambiguities, clarifying obscurities and harmonising antinomies the judges impart to the legal system that certainty without which as a guide to human conduct it would be reduced to the level of mere futility. When the legal system crystallises into a rigidity unsuited to the times, they create new modifying principles of equity in obedience to the claims of a higher morality. Then is seen in bold relief the creative power of the judicial process as a source of law.

(3) CLASSIFICATION OF PRECEDENTS

(A) DECLARATORY AND ORIGINAL PRECEDENTS

We have already observed that judicial decisions are of two kinds—those that create new law and those that merely apply known and established rules of law to the particular facts of the cases arising for decision. Decisions of either kind, it may be noted, operate as precedents, for the legal principles that they embody are authoritative guides to courts in the determination of future controversies. The first kind of precedent, however, being creative of law is called by Sir John Salmond 'original precedent' to distinguish it from the second that is only declaratory of existing law. The orthodox theory that all precedents are declaratory is maintained by some jurists. In the previous article we have said sufficient to indicate that this view is wholly untenable.

(B) PERSUASIVE PRECEDENTS

Historical source :—Unlike an authoritative precedent, ■ persuasive precedent is not a legal source of law. Having only persuasive efficacy, it is to be regarded rather as a historical source of law. It

is entitled to high respect, but will be followed by a court only if its reasoning commends itself to that court as sound, cogent and flawless. Thus, in India the decisions of one High Court are only persuasive precedents in the other High Courts. The rulings of the English and American Courts are also persuasive precedents only. *Obiter dicta* again have only persuasive influence. In England it is well recognised that observations by way of obiter have no binding force as such even if they have fallen from the House of Lords. As Lord Campbell said in *Attorney General v. Dean & Canons of Windsor*¹: "Observations made by members of the House.....beyond the ratio decidendi which is propounded and acted upon in giving judgment, although they may be entitled to respect, are only to be followed in as far as they may be considered agreeable to sound reason and to prior authorities."

(C) ABSOLUTELY AUTHORITATIVE PRECEDENTS

A precedent is said to be authoritative when the court to which it is cited is bound to follow it quite irrespective of whether in the opinion of that court it is a right decision or a wrong one. If its binding character is absolute, the judge's discretion is altogether excluded and the precedent is said to be absolutely authoritative. Such a decision has a legal claim to implicit obedience. For instance, in *Produce Brokers Co-v-Oil-Olympia & Cake Co.*,² Buckley L.J., opens his judgment thus: I am unable to adduce any reason to show that the decision which I am about to pronounce is right. On the contrary, if I were free to follow my own opinion, my own powers of reasoning such as they are, I should say that it is wrong. But I am bound by authority—which, of course, it is my duty to follow—and, following authority, I feel bound to pronounce the judgment which I am about to deliver."

Absolutely authoritative precedents in India :—Every court in India is absolutely bound by the decisions of courts superior to itself. The 'Subordinate courts'³ are bound to follow the decisions of the High Court to which they are subordinate.⁴ No subordinate court should presume to set its own opinion against the authoritative statement of the law laid down by the court to which it is subordi-

(1) 8. H. L. 369,

(2) *See on appeal* (1916) IA. C. 314.

(3) *Defined in the Civil Procedure Code.*

(4) 60 Bom, 311 (F. B.).

nate. In *Poomalai Padayachi v. Annamalai Padayachi*¹, Mr. Justice Somayya made the following observations:—"It is not open to the lower courts not to follow a direct decision of this court and to rely upon what appeared to the lower court as some grounds of equity and follow a decision of another court. This has been repeatedly pointed out and it is strange even in these days the lower courts are found to violate this principle and follow decisions of other High Courts. This cannot be too strongly condemned."

The Judges of the High Court sitting alone are bound by the decision of a Bench of two or more Judges². A Bench of two or more judges is bound by the decisions of the Full Bench of the same Court³. All the courts are absolutely bound by decisions of the Supreme Court.

In a recent Full Bench Decision of the Andhra High Court, *Subbarayudu v. The State*⁴, the following principles were affirmed by Subbarao, C. J., in the interests of ensuring uniformity of law: "A single judge shall not differ from the judgment of another judge of the same Court. If he does not agree he shall refer the matter to a Bench of two judges. He is bound by the decision of a Divisional Bench exercising appellate jurisdiction. If there is a conflict of Bench decisions, he should refer the case to a Bench of two judges who may refer it to a Full Bench. A single judge cannot differ from divisional Bench unless a Full Bench or the Supreme Court has overruled that decision specifically or laid down different law on the same point. A Divisional Bench must ordinarily respect another Divisional Bench but if it differs the case should be referred to a Full Bench."

In England :—In England decisions which have a legal claim to implicit obedience are those of the House of Lords. The decisions of that august body are absolutely binding not only upon all inferior tribunals but even upon itself. In *Attorney-General v. Dean & Canons of Windsor*⁵ Lord Cambell in advising the House said: "The decisions of the House of Lords are authoritative and conclusive declarations

(1) 56 L. W. 494.

(2) (1932) Mad. 693.

(3) 55 Mad. 883 (F. B.)

(4) 1955 A. L. T. 53 (F.B.); *K.C. Nambiar v. The State of Madras* A.I.R. 1953. Madras 351.

(5) 8. H. L. 369 at 391; *London Street Tramways Company London Council* (1893) A. C. 375 at 379

of the existing state of law and are binding upon itself when sitting judicially, as much as upon all inferior tribunals”.

The decisions of the Court of Appeal are likewise absolutely binding upon itself. In a recent case, *Young v. Bristol Aeroplane Co. Ltd.*¹ Lord Greene, M.R., observed thus : “On a careful examination of the whole matter we have come to the clear conclusion that this court is bound to follow previous decisions of its own as well as those of courts of co-ordinate jurisdiction. The only exceptions to this rule (two of them apparent only) are those already mentioned which for convenience we here summarize : (1) The court is entitled and bound to decide which of two conflicting decisions of its own it will follow. (2) The court is bound to refuse to follow a decision of its own which, though not expressly overruled, cannot, in its opinion, stand with a decision of the House of Lords. (3) The court is not bound to follow a decision of its own if it is satisfied that the decision was given *per incuriam*.”

It was argued in that case that the decision of the Court of Appeal was not absolutely authoritative and that the decision of a Division Bench could be overruled by a Full Court consisting of a larger number of judges. Negating this argument, Lord Greene, M. R. said : ‘We can find no warrant for the argument that what is conveniently but inaccurately called the Full court has any greater power in this respect than a Division of the Court consisting of three members only...The Court of Appeal is a creature of Statute and its powers are statutory. Neither in the Statute itself nor (save in two cases to be mentioned hereafter) in decided cases is there any suggestion that the powers of the Court of Appeal sitting with six or nine or more members are greater than those which it possesses when sitting as a division with three members”.

(D) CONDITIONALLY AUTHORITATIVE PRECEDENTS

A conditionally authoritative precedent is one which though ordinarily binding on the court to which it is cited, is liable to be disregarded in certain circumstances. Whether a precedent is absolutely authoritative or only conditionally so depends upon the court to which it is cited. For instance, in India, the decision of a single Judge of the High Court is absolutely authoritative so far as the subordinate judiciary are concerned but is only conditionally authoritative if cited

(1) (1944) I K: B, 718 at 729.

before a Division Bench of the same High Court.

Disregard of Precedents :—The disregard of a conditionally authoritative precedent may take either the form of overruling or of dissenting according ■ the court by which it is disregarded is ■■ invested with superior jurisdiction or one having co-ordinate authority. By overruling is meant that the precedent overruled is authoritatively pronounced to be wrong so that it cannot be followed by courts in the future. When exactly a decision may be regarded as overruled is explained by Warrington, L.J., thus : “The conclusion I draw is that in order that a case may be treated as overruled one must find either a decision of a superior court inconsistent with that arrived at in the case in question, or an expression of opinion on the part of that court as a whole that such case was wrongly decided on its own facts and not merely that it ought not to be treated as an authority in a case arising out of different facts”¹.

By the act of ‘dissenting’ is meant that the court declines to follow the precedent and lays down the law in a different sense. The conflict thus produced can be resolved only by a superior tribunal when occasion arises. Till the conflict is finally resolved the law remains in a state of uncertainty.

Illustrations of conditionally authoritative precedents :—It is highly desirable that as far as possible the law should be definite for it has to serve as an authoritative guide to human conduct. In India the decisions of a single judge of the High Court is only conditionally authoritative and may be dissented from by another single judge or overruled by ■ Division Bench. It ■■ formerly supposed that a Division Bench could dissent from the ruling of another Division Bench. This practice was not conducive to maintenance of certainty in the administration of justice. For this reason the Madras High Court has laid down the salutary rule that a Division Bench cannot dissent from the decision of another Division Bench. The practice that should be followed when ■ Division Bench has reason to doubt the soundness of of another Bench ruling is pointed out in *Seshamma v. Venkata Narasimha Rao* ² where Sir Lionel Leach observes thus : While ■ judge of a High Court sitting alone is not bound on a question of law by

(1) *Consett Industrial and Provident Society v. Consett Iron Co.*,
(1922) 2 Ch. 135 at 174.

(2) (1940) 1 M. L. J. 400 (F.B.) ■ 412.

the decision of another judge sitting alone, this principle goes no further. The Division Bench is the final court of Appeal in an Indian High Court unless the case is referred to a Full Bench, and one Division Bench should regard itself bound by the decision of another Division Bench on a question of law. In England where there is the Court of Appeal, the Divisional Courts follow the decisions of other Divisional Courts on the ground of judicial comity. If a Division Bench does not accept as correct the decision on a question of law of another Division Bench, the only right and proper course to adopt is to refer the matter to a Full Bench, for which the rules of this court provide. If this course is not adopted the courts subordinate to the court are left without guidance".

Can a Full Bench be overruled by another Full Bench?—On the question whether the decision of a Full Bench of the High Court may be overruled by another Full Bench consisting of a larger number of judges there is a difference of judicial opinion. In *Ningappa v. Emperor*¹. Beaumont, C.J., expressing the opinion that the decision of a Full Bench, until it is overruled by the Privy Council, is absolutely authoritative, observed thus: "There can be no doubt that a Full Bench can overrule a Division Bench and that a Full Bench must consist of three or more judges; but it would seem anomalous to hold that a later Full Bench can overrule an earlier Full Bench merely because the later Bench consists of more judges than the earlier. If that were the rule, it would mean that a Bench of Seven Judges, by a majority of four to three, could overrule a unanimous decision of a bench of six judges though all the judges were of co-ordinate jurisdiction." The Madras High Court, however, has taken the view that even a Full Bench may be overruled by a numerically stronger Full Bench. In *Raja of Mandasa v. Jagannayakulu*² Wallace J., observed: "The rules on the appellate side permit a Division Bench to refer any matter to a Full Bench and there are precedents for a Division Bench referring the decision of a Full Bench for consideration to a larger Bench." The proper procedure in such a case, as pointed out by Beasley, C. J., in that decision, is for the Division Bench 'to refer the matter to the Chief Justice and it is then for him to consider whether the question should be reconsidered by a larger Bench."

(1) (1941) Bom. 408.

(2) 55 Mad 883=1932 Mad 612 (F.B.)

To safeguard the element of certainty in the administration of justice it is necessary that a High Court should regard its Full Bench decisions as having an absolutely binding character. If such decisions are found to work any serious hardship, it is for the legislature to intervene and supersede them statutorily.

Distinction between absolutely and conditionally authoritative precedents :—A conditionally authoritative precedent then, unlike an absolutely authoritative precedent, is liable to be overruled or dissented from in certain circumstances. We shall now proceed to examine the conditions which should be satisfied before a court is justified in disregarding an authoritative precedent.

(4) CESSANTE RATIONE LEGIS CESSAT LEX IPSA

When can a conditionally authoritative precedent be disregarded ?—Blackstone after pointing out that “it is an established rule to abide by former precedents, where the same points come again in litigation,” proceeds to state that “this rule admits of exception where the former determination is most evidently contrary to reason; much more if it be contrary to divine law.....The doctrine of the law then is this: precedents must be followed unless flatly absurd or unjust.”

1st condition: Precedent should be erroneous :—The first condition for disregarding a precedent is that it should be shown to be erroneous. If a precedent departed, either wilfully or through inadvertence from a pre-existing rule of law, it is wrong and may be disregarded. In the absence of a pre-existing settled rule of law, a precedent has to conform to the principles of reason, morality and social utility and if it fails to do so, it is again wrong and liable to be disregarded. A precedent owes its authority in no small measure to the validity of the reasoning which it embodies. If the reasoning is vitiated and the conclusion founded thereon cannot be supported even by a different line of reasoning, the decision is clearly wrong and may be disregarded.

The maxim of the law is *Cessante Ratione Legis Cessat Lex Ipsa* (=when the reason for any particular law ceases, so does the law itself). The maxim cannot of course apply to Statute law. Even when the reason for the statute has disappeared, it cannot be set aside by the judge so long as it remains the solemn and unchanged will of the legislator for it derives its authority from the

act of promulgation by the legislature. The maxim applies to precedents. In the case of judiciary law, if the ground of the decision has fallen away, there is no law left for it is only the *ratio decidendi* or reason of the decision that imparts authority to precedent.

The ground of the decision is said to have fallen away if it is found to be repugnant to law and reason. This, as already observed, is the first condition to be fulfilled in order that a court may be justified in disregarding a precedent.

2nd condition : Disregard of Precedent necessary in the interests of justice :—The second condition for the disregard of a precedent is that its reversal should be expedient in the interests of justice. A precedent cannot be disregarded sometimes even though it be clearly wrong. It might have stood unquestioned for such a length of time and people might have confidently acted upon it as sound law so extensively that its rejection might result in great injustice. A precedent when overruled should be considered as having never been the law so that it cannot protect transactions entered into on the faith of it before it was overruled. There is a radical distinction between the repeal of a statute and the overruling of a precedent. A repealed statute ceases to be law only from and governs all transactions up to the date of its abrogation. The rejection of a precedent, on the other hand, has a retrospective operation and affects even transactions of a date prior to the authoritative declaration that the rule laid down by it is not good law. The disregard of a precedent affects the certainty of the law. For this reason courts cannot disregard a precedent lightly even if they consider it to be wrong. They should satisfy themselves that the reversal of the precedent is imperatively required in the interests of justice. If they can possibly apply the maxim *Communis error facit jus* (=common error makes law) they should rather follow the wrong precedent than disturb the certainty of the law.

(5) VALUE OF THE DOCTRINE OF PRECEDENTS

The value of judicial decisions in moulding the law is indisputable. Cases decided in the superior courts should therefore be reported and should be capable of being cited in courts. If the doctrine of precedents means, as it does in a loose sense, that decisions should be reported and receive due weight when cited in courts, none would

oppose the doctrine. The doctrine, in its strict sense, however, requires that the decisions of the highest court should be absolutely binding even upon itself. This is so in England where the highest court, the House of Lords, is bound by its own decisions. The argument in favour of such a doctrine is that it ensures certainty in the law. This certainty may, however, be secured at too great a price. The power of the judiciary to rectify their own errors is taken away by this doctrine. If the House of Lords were to decide a case wrongly, then short of statutory supersession of that case, there is no means whereby the perpetuation of the error can be prevented. It might not always be practicable for the legislature, which is usually overwhelmed by its day-to-day work of keeping a check on policy-making in the administrative field, to act with promptitude for the reversal of erroneous decisions. This drawback of the doctrine of judicial precedent, namely, the irreversibility of decisions rendered at the highest level has to be set against the certainty in the law which the doctrine is supposed to ensure. The doctrine, however, need not be abandoned altogether on this account. It would be desirable to modify it by freeing the highest court from the cramping effects of the doctrine. While the rule should be rigidly applied that subordinate courts should not deviate from the decisions of the superior courts, the highest court should be left free, if it sees fit, to depart from its previous decisions. It may be mentioned that in America so far as constitutional cases are concerned the Supreme Court does not feel itself bound by its prior decisions and considers itself free to reconsider the matter in the light of changing political and social conditions. The Supreme Court in India has also adopted the same view and has not hesitated to overrule its own decisions.

CHAPTER XXXVII

LEGISLATION

(1) LEGISLATION AS A SOURCE OF LAW

Definition :—To some writers, notably Bentham and Austin, legislation signifies any form of law-making. The term should, however, be restricted to that process of legal evolution which consist in the formulation of rules of law by the authority appointed by the constitution for the purpose. By legislation, therefore, we mean the promulgation of legal rules by an authority duly empowered in that behalf.

Law originating in legislation was included by the Roman Lawyers under the description of *Jus Scriptum* which they contrasted with the customary law or *jus non scriptum*. Blackstone followed this usage, but Sir John Salmond suggested that the term 'enacted law' is preferable since there may be written law or *jus scriptum* which is not at the same time the product of legislation.

Place of Legislation among the sources of law :—To the analytical school the typical law was a statute and legislation was the normal process of law-making. Analytical jurists frowned upon judiciary law as an unauthorised usurpation of the legislative function and rejected the claim of custom to be regarded *per se* as a source of law.

The historical school, on the other hand, regards legislation as the least creative of the sources of law. James Carter says ; " It is not possible to *make law* by legislative action. Its utmost power is to offer a reward or threaten a punishment as a consequence of particular conduct and thus furnish an additional motive to influence conduct. When such power is exerted to reinforce custom and prevent violations of it, it may be effectual, and rules or commands thus enacted are properly called laws ; but if aimed against established custom they will be ineffectual. Law not only cannot be directly made by human action, but cannot be abrogated or changed by such action"¹

(1) Carter : *Law, its origin, growth and function*, p. 130

In this view legislation has no independent creative role at all, for its only legitimate purpose is to give better form and make more effective the customs spontaneously developed by the people.

The extreme views of the analytical and historical schools require modification. The error of the analytical school lies in regarding legislation as the sole source of law. Custom and precedent have equally valid claims to recognition as material sources of the law. The error of the historical school lies in the supposition that legislation can never be a source of new law. As Dean Pound points out, there are two types of legislation—an organising type such as the historical school conceived, and a creative type. The existence of the latter can hardly be doubted in these days of abnormal legislative activity. Enactments like the Workmen's Compensation Acts are sufficient to dispel any lingering doubts on this point.

(2) SUPREME AND SUBORDINATE LEGISLATION

Distinctive Test :—Legislation is said to be supreme when it proceeds from the sovereign body in the state. The characteristic of such legislation is that it cannot be abrogated or invalidated by any *other legislative authority*. Legislation that is lacking in this feature is said to be subordinate for it is subject to the control of a superior legislative authority. Applying this criterion it is easy to see that legislation emanating from the British Parliament is supreme. By the same test in the United States the legislation of Congress as well as the legislatures of the states is supreme.

Position of colonial legislatures :—The position of the Colonial legislatures may be seen from the following provision of the Colonial Laws Validity Act, 1865.

“Every representative legislature shall have full powers to make laws respecting the constitutions powers and procedure of such legislature, provided such laws have been passed in such manner and form as may from time to time be required by any Act of Parliament, Order-in-Council, Letters Patent, or Colonial Law for the time being in force.” It is clear that colonial legislatures are subordinate for it is left to Parliament to prescribe the conditions of the validity of their legislation.

Dominion Legislatures :—Turning to the Dominion legislatures, we notice that the Statute of Westminster by Section 2 makes the above mentioned Act inapplicable to the Dominions and further

provides: "No law made after the commencement of this Act shall be inoperative or void on the ground that it is repugnant to the law of England or to any order, rule or regulation made under any present or future Act of Parliament and the powers of the Dominion Parliament shall include the power to repeal, or amend any such Act order, rule or regulation in so far as the same is part of the law of the Dominion". We have to conclude that the legislatures of the Dominions, after the enactment of the Statute of Westminster, are sovereign legislatures.

Forms of subordinate legislation :—There are five forms of subordinate legislation :

(i) **Colonial :—**British colonies enjoy varying degrees of self-government. The British Parliament has conferred limited law-making power upon the colonies. The legislation emanating from the colonial legislatures is an instance of subordinate legislation.

(ii) **Executive :—**The legislature not infrequently makes a skeleton enactment conferring upon the executive a rule-making power for carrying out the intentions of the legislature. The rules made in pursuance of this power of delegated legislation have the force of law. They are liable however, to be superseded by the legislature if it is so minded. Thus this kind of legislative power possessed by the executive is a species of subordinate legislation.

(iii) **Judicial :—**The superior courts have powers of rule-making for the regulation of their own procedure. This too is a kind of subordinate legislation.

(iv) **Municipal :—**Municipal bodies enjoy by delegation from the legislature a limited power of making regulations, for the area under their jurisdiction. These regulations known as by-laws are also the product of a species of subordinate legislation.

(v) **Autonomous legislation :—**See Autonomous law, page 125.

(3) DIRECT AND INDIRECT LEGISLATION

Distinctive Test :—The framing of laws by the legislature is direct legislation. The declaration of legal principles by other sources to whom law-making power is confided by the legislature is an instance of indirect legislation. The various forms of subordinate legislation, with the exception of colonial legislation, are instances of indirect legislation. In colonial legislation, the law-making power is

exercised by a legislative body and is thus to be treated as direct legislation.

Delegated legislation & conditional legislation :—When a legislature confers law-making power upon some other body, the legislative power is said to be delegated. If the legislature itself enacts the law and gives to some other body only the power of determining when, for instance, it should come into force or when it should be applied to a particular area of the state, there is no delegation of legislative power. Such legislation is called conditional legislation. In delegated legislation powers of legislation as such are transferred.

(4) JUDICIAL INTERPRETATION OF STATUTE LAW

Meaning of interpretation :—Legislation is inseparable from a process of interpretation by the courts. Though statutes are carefully drawn up, it is not possible to reduce the application of law to a mere mechanical process of bringing a given case under a given section. However explicit the words of a statute may be, a court must determine the precise meaning of the phraseology before it can apply the law. The method by which the courts ascertain the meaning of the language of a statute is called the interpretation of enacted law.

(A) GRAMMATICAL INTERPRETATION

Golden Rule of Interpretation :—The dominant purpose of interpretation is to ascertain the intent of the legislature. To this end the cardinal rule applied by the judges is that the meaning of the legislator is to be sought in the actual words used by him, which are to be understood in their ordinary and natural meaning. This is called 'grammatical interpretation' and where there is no ambiguity in the language employed by the statute no other form of interpretation is permissible. As observed in the *Sussex Peerage case*¹: "The only rule for the construction of Acts of Parliament is that they should be construed according to the intent of the Parliament which passed the Act. If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to explain the words in their natural and ordinary sense. The words themselves alone do, in such cases, best declare the intention of the lawgiver."

This rule is regarded by Lord Wensleydale as the 'golden rule' for the interpretation of statutes. In *Grey-v-Pearson*² he observes:

(1) 8 E. R. 1034.

(2) 10 E. R. 1216.

“In construing statutes, ■ in construing all other writtern instruments, the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified ■ ■ to avoid that absurdity and inconsistency, but no further”.

The respect of the judges for the words of the statute is usually such that they consider themselves bound by the exact phraseology, even though the effect of so doing may be to produce sinister consequences in the law. Lord Brougham delivering the judgment of the Judicial Committee has observed as follows in *Crawford v. Spooner*¹: “The construction of an Act must be taken from the bare words of the Act. We cannot fish out what possibly may have been the intention of Legislature. We cannot aid the Legislature’s defective phrasing of the statute. We cannot add and mend and by construction make up deficiencies which are left there.....The true way in these cases is to take the words as the Legislature has given them and to take the meaning which the words given naturally imply unless where the construction of those words is either by Preamble or by the context of the word in question controlled or altered. And, therefore, if any other meaning was intended than that which the words purport plainly to import, then let another Act supply the meaning and supply the defect in the previous Act.”

(B) LOGICAL INTERPRETATION

When permissible :— Logical interpretation involves going behind the language used in the statute for the ascertainment of its meaning and is resorted to when Grammatical interpretation fails to meet the case. As to when logical interpretation is entitled to supersede grammatical is clearly pointed out by Lord Macnaghten in *Vacher and Sons Ltd., v. London Socieiy of Compositors*². He observes that: “There can, I think, be only two cases in which it is permissible to depart from the ordinary and natural sense of the words of an enactment. It must be shown either that the words taken in their natural sense lead to some absurdity or that there is some other clause in the body of the Act inconsistent with, or repugnant to the enactment in question construed in the ordinary sense of the language in which it is expressed”.

(1) 18 E. R. 667.

(2) (1913) A. C, 107 at 118.

Logical defects in expression may be removed by Interpretation :—

Logical interpretation is thus permissible in two cases. In the first place, the text of the statute when literally understood may lead to a result so manifestly absurd and unreasonable that it may well be presumed that the legislature could not have meant what it has said. In such a case the meaning of the legislature has to be deduced by looking behind the *litera legis*, that is by the process of logical interpretation.

The second case, in which, according to Lord Macnaghten, logical interpretation is permissible is when the literal interpretation leads to repugnancy. Owing to the imperfections of language a particular word used in the statute may in the context produce some inconsistency and render the provision of the law meaningless. In such a case too logical interpretation should be resorted to. The rule of inconsistency mentioned by Lord Macnaghten is but one illustration of logical defects in statutory expression. Other defects which, according to Salmond, render the supersession of grammatical interpretation permissible are incompleteness and ambiguity. Incompleteness is the vice of providing for only one contingency when alternative contingencies that might possibly arise should also be provided for. Ambiguity as a logical defect of the *litera legis* appears when the expression used in the statute is susceptible of a variety of meanings. Ambiguity and incompleteness, quite as much as inconsistency, necessitate a resort to logical interpretation.

Strict and equitable Interpretation :—When the *litera legis* suffers from ambiguity, it usually happens that one of the meanings is more obvious and consonant with the popular use of language. If this meaning is adopted, the interpretation is called strict or literal. Courts sometimes reject the natural or most known signification in favour of another which conforms better to the intention of the legislature, the *sententia legis*, though it may accord ill with the ordinary use of language. When this is done, we have an example of equitable interpretation.

Restrictive and Extensive Interpretation :—Equitable interpretation is either restrictive or extensive, according as it is narrower or wider than the literal interpretation.

The rule of restrictive interpretation is applied to penal and fiscal statutes. These statutes impose restraints on the liberty of a person or on the enjoyment of property. For this reason in *dubio*

courts lean against ■ construction which imposes ■ greater burden on the subject than is warranted by the literal meaning of the language employed in the statute.

Illustration of 'extensive interpretation':—An interesting illustration of extensive interpretation is furnished by the decision in *Nisbet v. Rayne and Burn*¹. Nisbet was ■ cashier of the defendants, a firm of coal-owners. It was part of his duties to take every week from the office to the colliery the cash out of which the wages of the employees at the colliery were paid. While so engaged he was robbed and murdered. His widow claimed damages under Sec. I of the Workmen's Compensation Act, 1906. The Section provides that when ■ workman has met his death by an '*accident*' arising out of the course of his employment, his widow may claim damages from the employers.

It was argued that murder could not be considered as an accident within the meaning of the Act. Accident implies the absence of intention while murder is clearly a deliberate and intentional act on the part of the criminal.

Lord Justice Kennedy agreed that "the description of death by murderous violence ■ an accident cannot honestly be said to accord with the common understanding of the word". He, however, observed: "I conceive it to be my duty rather to stretch the meaning of the word from the narrower to the wider sense of which it is inherently and etymologically capable, that is, 'any unforeseen and untoward event producing personal harm' than to exclude from the operation of the section ■ class of injury, which it is quite unreasonable to suppose that the legislature did not intend to include within it."

Since the word was given ■ wider meaning not warranted by the familiar usages of speech, the kind of interpretation adopted by Lord Justice Kennedy in the above case may be described as extensive interpretation.

The following methods of interpretation—Historical and sociological—which have not been specifically mentioned by Salmond, may also be noted :

(C) HISTORICAL INTERPRETATION

A form of logical interpretation :—A third method of interpret-

(1) (1910) 2 K. B. 689.

tation—Historical interpretation—is useful when the language of the statute affords no clue to the intention of the legislature. We have seen that grammatical interpretation breaks down when the letter of the law is defective and the intention of the legislature is not manifested unmistakably. We pointed out that in such a case the true intention of the legislature which has received imperfect expression in the statute is ascertained by a process of logical interpretation. Sometimes the intention of the legislature, *the sententia legis*, may itself be defective. Not infrequently, the defects of the *litera legis* are only reflections of corresponding defects in the *sententia legis*. In such cases courts should consider the circumstances attending the original enactment and give effect to the intention which the legislature would presumably have expressed if its attention had been drawn to the particular question

As early as 1584 it was laid down in *Heydon's case*¹ that “for the sure and true interpretation of all statutes in general be they penal or beneficial, restricting or enlarging the Common Law, four things are to be discussed and considered: first, what was the Common Law before the making of the Act; second, what was the mischief and defect for which the Common Law did not provide; third, what remedy the Parliament hath resolved and appointed to cure the disease of the commonwealth; fourth, the true reason of the remedy; and the office of all the judges is always to make such construction as shall suppress the mischief and advance the remedy, and suppress subtle inventions and evasions for continuance of the mischief”.

Limits of Historical interpretation :—Historical interpretation has definite limits. Even in ascertaining the supposed intention of the legislature, courts cannot travel out of the language used in the statute. Thus proceedings in the legislature or the history of the introduction of a particular clause in the statute in its progress through the legislature cannot be considered. Lord Birkenhead said *Rhonda's (Viscountess) claim*²: “The words of the Statute are to be construed so as to ascertain the mind of the legislature from the natural and grammatical meaning of the words which it has used, and in so construing them the existing state of the law, the mischiefs to be remedied and the defects to be amended, may legitimately be looked at together with the general

(1) 76 E. R. 637=(1584) 3 Co. Rep. 70.

(2) (1922) 2 A. C. 339.

scheme of the Act". Lord Wrenbury pointed out in the same case that "The debate upon the bill, the fate of amendments proposed and dealt in Committee of either House cannot be referred to, to assist in construing the language of the Act as ultimately passed into law with the Royal assent".

(D) SOCIOLOGICAL INTERPRETATION

Not recognised by judges :—Jurists of the sociological school are inclined to give judges very wide latitude in the interpretation of enacted law. According to Kohler for the determination of the correct interpretation courts can properly refer to the history of social movements and enquire into the social needs, objects and purposes which were agitating the society at the time of the legislation and which the statute had in view. He observes: "The opinion that the will of the law-maker is controlling in construing legislation is only an instance of the unhistorical treatment of the facts of the world's history and should disappear entirely from jurisprudence. Hence the principle: rules of law or not to be interpreted according to the thought and will of the law-maker, but they are to be interpreted sociologically, they are to be interpreted as products of the whole people, whose organ the law-maker has become"¹. Benjamin Cardozo has these pregnant observations on this subject: "Formerly men looked upon law as the conscious will of the legislator. To-day they see in it a natural force.....It is no longer in texts or in systems derived from reason that we must look for the source of law; it is in social utility, in the necessity by that certain consequences shall be attached to given hypotheses. The legislator had a fragmentary consciousness of this law; he translates it by the rules which he prescribes. When the question is one of fixing the meaning of those rules, where ought we to search? Manifestly at their source; that is to say, in the exigencies of social life. There resides the strongest probability of discovering the sense of the law. In the same way when the question is one of supplying the gaps in the law, it is not of logical deductions, it is rather of social needs, that we are to ask the solution"².

It should be noted that the method of sociological interpretation has not yet received judicial recognition. It has now the support of eminent jurisprudential writers and its importance is bound

(1) *Quoted by Dean Pound: Modern Legal Philosophy Series Vol. 9 at p. 225.*

(2) *Cardozo : Nature of the Judicial Process, p. 121.*

to increase with the deepening of the sociological tendency in the approach to judicial problems.

(5) SOME RULES OF CONSTRUCTION

(A) EQUITY OF A STATUTE

The principle of "Equity of a statute" is defined by Coke as follows "Equity is a construction made by the Judges that cases out of the letter of a statute yet being within the same mischief or cause of making the same, shall be within the same remedy that the statute provideth ; and the reason thereof is for that the law-makers could not possibly set down all cases in express terms." This principle is well illustrated by the American decision in *Riggs v. Palmer*.¹ It was held in that case that a murderer could not be permitted to take under the will of his victim and transmit rights to his own heirs, although the statutes regulating the devolution of property by will, if literally construed, did not stand in the way of the murderer benefiting by the testamentary disposition his victim. The Court observed ; " If the law-makers could, as to this case, be consulted, would they say that they intended by the general language that the property of a testator or of an ancestor should pass to one who had taken his life for the express purpose of getting his property ?"

The principle of Equity of a statute is not looked upon with favour. Courts are not generally disposed to fill in lacunae left by the legislature.

(B) RULE OF CASUS OMISSUS

The Casus ommissus rule provides that omissions in a statute cannot, as a general rule, be supplied by construction. This rule is well illustrated by the recent case of *Parkinson v. Plumptre* (1954).¹ All E. R. 201. The Catering Wages Act, 1943, prescribed minimum wages payable to workers in catering establishments. The schedules to the Act provided for minimum wages (1) when the employer supplies the worker with full board and lodging ; (2) when the employer supplies the worker with neither full board nor lodging.

The plaintiff was a worker in a catering establishment. She was provided with full board but not with lodging. She claimed that she was paid less than the minimum wages payable under the Act. Lord Goddard C. J., dismissing the action observed : "I think there is a *casus ommissus*, and that the draftsman has forgotten to provide for

¹ (1) (1889) 15 N. Y. 506.

the ~~case~~ where, as here, board is provided, but not lodging within the meaning of the schedule. I suppose it was thought that full board would only be supplied when lodgings were provided, and, ■■ I have said, lodging seems to be put out of account here. These people were there full time, and so, therefore, you have got this unfortunate hiatus. One always tries to construe words so as to give them a sensible construction and prevent their failure, but I do not know of any canon of construction which enables me to construe 'where the employer supplies the worker with neither board nor lodging' to include a case where the employer supplies full board but no lodging. I can't re-write the legislation. I must enter judgment for the defendant."

(C) RULE OF EJUSDEM GENERIS

Rule of Ejusdem Generis :—According to rule of *Ejusdem generis*, the words of a statute should be understood in their context and this rule requires that when general words are used in a summarising or comprehensive manner, they should be taken ■■ referring only to those kinds of things with which the context deals explicitly or implicitly. In Byren's Law Dictionary the rule of *Ejusdem generis* had been explained as follows : " It is a rule of legal construction that general words following enumeration of particulars are to have their generality limited by reference to the preceding particular enumeration and to be construed as including only all other articles of the like nature and quality."

(6) THE RELATIVE MERITS OF LEGISLATION AND PRECEDENT

Legislation is to-day the most important instrument of legal evolution and in the opinion of some jurists bids fair to become the exclusive material source of law. In countries where the rule of *stare decisis* obtains, precedent or case-law takes rank as a material source of law, next only to legislation in point of importance. We shall now discuss the relative merits of these two methods of legal evolution.

(A) ADVANTAGES OF LEGISLATION OVER PRECEDENT

(i) **Abrogative power :—**The obvious superiority of legislation over precedent arises from its abrogative power. Legislation is the easiest instrument of excision and is resorted to for abolishing existing law and substituting something better in its place. Precedent, on the other hand, can create new law only so far ■■ the new law is

not in conflict with the old. Judicial decisions cannot brush aside a settled rule of law however pernicious it may be in practice. As C. J. Holmes said : "A Common Law Judge could not say 'I think the doctrine of consideration ■ bit of historical nonsense and shall not enforce it in my court". It is only by legislation that settled law can be effectively altered.

Comparison of legislation and precedent as instruments of legal reform :—Legislation is undoubtedly indispensable for legal reform. Though precedent has only constitutive efficacy and cannot discharge the abrogative function, it must not be forgotten that historically legal amelioration was effected by judges before legislators came on the scene. An illustration given by Dicey in *Law and opinion in England* brings out of the respective characteristics of judicial and legislative reform. The law relating to the proprietary rights of married women, he points out, worked great hardship on women at common law. The wife lost and the husband acquired immediately upon marriage all disposing power over her property. The Court of equity set to work and gradually developed the doctrine that property could be given for the separate use of ■ woman, whether before or after marriage, to ■ trustee who would be obliged by the court to hold it for her exclusive benefit and to enable her to dispose of the property and its income as if she were unmarried. Where no trustee was appointed, the husband ■■ obliged to hold his legal ownership as trustee for the wife. In order that married women might not be persuaded or coerced against their will to exercise in favour of their husbands the power of disposition thus assured to the wives, the Chancellors of Equity developed the doctrine of restraint on anticipation so that a woman could not during her coverture assign the income or sell or charge the corpus of the estate. The whole of this reform achieved by judicial methods occupied upwards of two centuries before it could be perfected and made effectual. The Married Women's Property Act, 1882, carried out this reform at one legislative stroke. Dicey remarks : "Parliamentary legislation from the time when it began to operate produced its effect with great rapidity.....The court of Chancery, it may be said, took centuries to work out incompletely a reform which Parliament at last carried out with more or less completeness in less than quarter of a century"¹. Dicey no doubt points

(1) *Dicey: Law and Opinion in England* p. 396.

out that "in fairness we must remember that Parliamentary reformers borrowed the ideas on which they acted from the Courts of Equity, and that during the centuries the Court of Chancery was gradually but systematically removing for the benefit of married women the injustice of the Common Law, Parliament did little or nothing to save any woman from rules under which marriage might and sometimes did deprive her of the whole of her property".¹

It is clear that as an instrument of legal reform legislation is superior to precedent. As Benjamin Cardozo observes: Legislation can eradicate a cancer, right some hoary wrong, correct some established evil, which defies the feebler remedies, the distinctions, the fictions, familiar to the judicial process".² The value of legislation as an instrument of reform cannot be under-estimated.

(ii) **Prospective operation:**—A rule of judiciary law is always an *ex post facto* law in relation to the decided case by which the rule is introduced. Its operation is retrospective being applied to facts which are prior in date to the law itself. This is opposed to the fundamental principle of natural justice that the law shall be known before a person is to suffer for its infraction. On this ground Bentham inveighed against judicial 'law-making'. In his *Comment on the commentaries*, he observed: "Is it not to be wished that a man could know for certain, the legal consequences of his doing an act before he does it? Is it not to be wished that a method could be adopted whereby a man meaning to conform to the law might save himself from punishment in one case, from disappointment in another, from litigation (which to be unsuccessful in subjects to punishment) from litigation, I say, in both?"³ The remedy suggested by Bentham is "transforming the rule of conduct from common law into statute law, that is, as I might say, into law from no-law; to mark out the line of the subject's conduct by visible directions, instead of abandoning him in the wilds of perpetual conjecture."⁴

Legislation is free from this defect for its formal declaration precedes its enforcement by Courts. Some Statutes are no doubt given retrospective operation. This, however, is done rarely and in exceptional cases when there is justification for the course in high public policy.

(1) *Dicey: Law and Opinion in England* p. 396

(2) *Cardozo: The Growth of the law.* p. 134.

(3) *Bentham: Comment on the Commentaries*, p. 102.

(4) *Ibid*, p. 104

Illustration of retrospective legislation :—An instructive instance is furnished by the history of the Mussalman Wakf Validating Act. The Privy Council decided in *Rasamaya v. Fata Mahomed* 22 Cal. 619 (P. C.) that a wakf (trust) for the benefit of the members of the wakif's family from generation to generation and in their absence for the benefit of the poor, was invalid and could not be given effect to. Such wakfs had the sanction of the Koranic law and had always been regarded as valid by Mahomedan jurists of eminence. The decision of the Privy Council caused a widespread feeling of alarm among the Mahomedan inhabitants of India. The Mussalman Wakf Validating Act, VI of 1913, was passed to validate such wakfs. This Act had no retrospective operation and so could not save trusts of the kind permitted by that Act, but created before it came into force. There was continuous public agitation for remedying this defect with the result that Act, XXXII of 1930 was passed giving retrospective effect to the provisions of the previous Act.

Statutes usually prospective :—Retrospective Statutes are uncommon and the courts always presume a Statute to have only prospective operation. Statutes thus usually satisfy our notion of natural justice that laws shall be known before they are enforced.

(iii) **Coherency :—**"Case-law," says Cardozo, "is the out-put of a multitude of minds and must be expected to contain its proportion of vagaries"¹. The law made by judges has to develop from precedent to precedent. It is every time restricted to the particular case which gives occasion for its formulation and application. The rule which it can lay down is limited to a narrow species although the genus, which includes the species, ought to be provided for at the same time by a comprehensive rule. Judiciary law is therefore bound to be lacking in coherency and completeness. Through legislation, on the other hand, the law lends itself to a systematic treatment. This is no mean advantage of legislation over case-law.

Dicey's view :—That a case-law system is not as coherent or consistent as a system of statute law is not admitted by Dicey who observes : "Judicial legislation aims to a far greater extent than do enactments passed by Parliament, at the maintenance of the logic or the symmetry of the law. The main employment of a court is the application of well-known legal principles to the solution of given cases, and the deduction from those principles of their fair logical

(1) Cardozo : *The Growth of Law*, p. 5.

result. Men trained in and for this kind of employment acquire a logical conscience ; they come to care greatly—in some cases excessively—for consistency”.¹

(iv) Certainty :—A legal system secures greater certainty when the law is codified by legislation than when it stands on the basis of case-law. Precedents are dependent upon concrete cases coming before the courts for decision. They cannot by way of anticipation make rules for cases that might arise in the future. A great many gaps and vacancies are therefore bound to exist in a system of case-law. The element of uncertainty is greater in such a system than under enacted law. Sir John Salmond, while accepting this position, points out that a legislator having only hypothetical cases in view cannot make provision adequately for all the complications that may arise in actual practice. The judge, on the other hand, being face to face with the problem as it arises in actual life, can lay down rules better suited to attain the ends that have to be kept in view.

View of Amos :—Some jurists deny that the law is more uncertain when it is based on precedents than when it is founded on enacted law. Continental countries like France have codified their laws but it appears that the law has not gained in certainty thereby. Sheldon Amos observes : “The greatest possible uncertainty and vacillation that have ever been charged upon English law are little more than insignificant aberrations when compared with what a French Advocate has to prepare himself for when called upon to advise a client... ..It is well-known, for instance, that the set of French codes, which in time became the most comprehensive and self-dependent of all, have been completely overridden by the interpretations of successive and voluminous commentators, as well as by the constantly accumulating decisions of the Court of Cassation”.²

Fallacy of the view of Amos :—Amos has only demonstrated that uncertainty may persist in a legal system even if it is based on enacted law. The law, whether statutory or judiciary, can never be adequate to existing needs and its gaps are revealed when novel combinations of facts present themselves for judicial decision. Only by legislation, however, can a conscious effort be made to fill as many of these gaps as can reasonably be foreseen. In this sense we have

(1) *Dicey : Law and Public Opinion in England*. p.364.

(2) *Amos : An English Code*, p. 125.

to admit that legislation is capable of ensuring greater certainty in the legal system than precedent.

(v) **Clarity and Accessibility** :—A statute is expressed in abstract terms as a series of general rules. It is, therefore, clear and concise and may be understood by the layman. A Law made by judicial decisions, on the other hand, exists nowhere in a general or abstract form. The rule of law is contained in the decision itself and has to be ascertained by a process of induction. The process may be analysed thus: one should consider first the particular circumstances of the case and the general propositions which the judge lays down. Then one must reject those general propositions that are not called for by the peculiar circumstances of the case, for these are *Obiter Dicta* and irrelevant. Finally the general propositions pertinent to the facts must be freed from such modifications as are suggested by the peculiar circumstances of the case. Then there would be left a general rule applicable to cases of a class which is called the *Ratio decidendi*. It is this that contains law laid down by the decisions. The process of extracting the law from decided cases is thus a difficult one which can be undertaken only by a professionally trained person. The bulk of the people are therefore not in a position to comprehend the rules of judiciary law. A statute law, on the other hand, being stated as succinct propositions, is easy of comprehension. Moreover, judiciary law being imbedded in numerous law Reports is not as easily accessible as statutory law which is contained in specific enactments.

(B) ADVANTAGES OF PRECEDENT OVER LEGISLATION

Some of the merits of precedent or case-law have already been noticed in the course of the above discussion. We have seen that the rules of judiciary law are better adapted to serve the desired ends than the rules laid down *a priori* by the legislature. They are also worked out with greater logical consistency and symmetry than statute law since they are made by judges trained in law and the administration of justice. Two other merits of judiciary law may be noticed here.

Better ethical content :—“The morality of the Courts”, says Dicey, “is higher than the morality of politicians”¹. Not infrequently, we feel at liberty to denounce statutes as wrong, tyrannical and unjust. It is because legislation is generally the product of the will of politicians who are liable to be effected by popular passions

(1) Dicey : *Law and opinion in England* p. 368.

of the hour. Judiciary law, on the other hand, is made in the serene atmosphere of courts of justice by persons trained to hold the scales of justice evenly. Judiciary law is thus more equitable than statutory law. This conclusion is reinforced when we contrast drastic expropriatory Legislation in favour of debtors undertaken in some of our States with the relief against usury and penal rates of interest that judicial practice has sanctioned.

Flexibility :—Sir John Salmond points out that one of the advantages of a system of case-law over enacted law consists in the greater flexibility of the former. Rigidity is the capital defect of statute law. In the case of statute law the letter of the law governs and so the true spirit of the law has sometimes to be sacrificed. The phraseology employed by a statute may fail adequately to express its true intentment. The courts, however, are bound by the literal expression and it not infrequently happens that the reason of the law is defeated by strict adherence to the letter. This cannot happen in the case of precedent for there duty of the court is to reach the spirit of the decision, the underlying *ratio decidendi*. Since it is not the literal expression but the reason of the rule that matters, analogical extension is permissible in the the case of precedents. The system thus assumes a flexible character and broadens from precedent to precedent.

(7) CODIFICATION

Meaning of Codification :—Codification is the Methodical arrangement of the whole body of the law or of any particular branch of it so as to present it in the form of a systematic statement of general principles and rules. It involves the reduction of the *corpus juris*, so far as practicable, to statutory form. It need not necessarily involve any change in the matter of the law though the occasion for codification is naturally availed of to effect desirable reforms in the existing law.

Effect of Codification :—It is sometimes supposed that codification dispenses with the need for exposition of the law by persons professionally trained in law. When codification was first attempted in Germany, in a Cabinet Order of 1780, the king thus expressed himself: "If I attain my end, matters will become so simplified that the members of the legal profession generally will lose the mysterious respect that is paid them for the subtleties they trade in and

the whole body of modern advocates will be rendered useless." This view as to the effect of codification has been confuted by the experience of continental codes. Judicial exposition of the law with the assistance of advocates professionally trained will be necessary even after the most comprehensive codification of the law has been effected. Precedent as a source of law cannot be altogether eliminated by codification. With the advent of codification, however, case-law ceases to be the groundwork of the legal system and becomes supplementary to enacted law. Case-law retains its importance now as a judicial commentary upon the code removing by way of decisions any ambiguities and inconsistencies in it. Amos suggests the preparation of a series of yearly reports to the legislature on the operation of the code, which, at the end of each ten years, will form the basis for the amendment of the code.¹ The code as amended would, of course, be subjected to the process of judicial interpretation as before.

(1) *Amos : An English Code*, p. 77.